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THE INSTITUTE OF BANKERS.

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# Legal Decisions affecting Bankers

VOL. III.—1911–1924.

EDITED AND ANNOTATED BY
SIR JOHN R. PAGET, BART., K.C.

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# PREFACE TO VOLUME III.

*The success of the two earlier volumes of "Legal Decisions affecting Bankers" has induced the Council of the Institute of Bankers to supplement them by this third volume, containing the cases reported since the beginning of the year 1911.*

*The Council have again availed themselves of the valuable services of* Sir John Paget, Bart., K.C., *in editing and annotating the cases.*

*They once more express their obligations to the Council of Law Reporting, to the proprietors of "The Times," and others for the permission to make use of their reports, to which reference is in each case given.*

*October 1924.*

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# Legal Decisions affecting Bankers.

## VOLUME III.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

## THE BANK OF MONTREAL *v.* STUART AND ANOTHER.

Reported. [1911] A.C. 120. 27 Times L.R. 117. Journal, Vol. XXXII, p. 91.

*Wife as Surety for Husband.*

THIS was an appeal from a judgment of the Supreme Court of Canada of April 5th, 1909, reversing decisions of the Court of Appeal for Ontario and of Mr. Justice Mabee.

The action was originally brought by Mrs. Stuart in Canada to set aside a guarantee for $100,000, subsequently increased to $125,000 and various charges and assignments created by her on her separate property in favour of the bank and under the influence of her husband, to secure liabilities of his as indorser of a promissory note made by the Maritime Sulphide Company for $175,000. She alleged that he was the agent of the company, that she received no consideration for the guarantee, charges or assignments and, as the bank knew, had no independent advice throughout the transactions. The husband was added as a party in the course of the proceedings and practically supported the wife's statements and contentions. The facts, as set out in the judgment delivered by Lord Macnaghten, were as follows :—

On her father's death in 1886, Mrs. Stuart came into a considerable amount of property, of which her husband assumed the active management. In the same year, Mr. Stuart, who was then also a man of means, became president of the Maritime Sulphide Company. There were only five shareholders, of whom Mr. Stuart was one, and a Mr. Bruce another. The company was a failure, and in 1891 it owed $275,000 to the defendant bank. By the creation of preference shares, which were all taken up

and paid for by the five shareholders, $100,000 were raised which went to reduce the debt to the bank. At the end of 1895, the company was in great difficulties; it owed $100,000 to the Bank of Hamilton, and $100,000 to the Bank of Montreal in addition to the existing balance of $175,000. One of the shareholders paid $100,000 to the Bank of Montreal, and Mr. Stuart discharged the $100,000 owing to the Bank of Hamilton by getting his wife to sign a note for $125,000 as for a loan to her. The Bank of Hamilton discounted this note and Mr. Stuart paid it out of his wife's money. It was hoped that the Bank of Montreal would then be willing to make further advances to the company. They ultimately declined to do so without the personal security of the shareholders.

One, at least, of such shareholders was unwilling so to bind himself, and Mr. Stuart then proposed his wife to the bank as guarantor. The negotiations between Mr. Stuart, the other shareholders and the bank were carried on by Mr. Bruce, who, besides being a director and secretary of the company, was solicitor to the bank and acting as legal adviser to Mr. Stuart. He had no communication with Mrs. Stuart until she came to his office with her husband and signed the guarantee. This she did on February 24th, 1896. Two documents were simultaneously executed by way of consideration for her undertaking the liability. One purported to postpone to any payments made by her under the guarantee, two payments of $125,000 and $150,000 made by one of the shareholders and Mr. Stuart respectively. As the judgment points out, this $150,000 included the $100,000 paid by Mr. Stuart to the Bank of Hamilton out of his wife's own money, though this was not known to the Bank of Montreal or Mr. Bruce. The other instrument transferred from the shareholders to Mrs. Stuart shares in the company, then of only nominal value.

On April 11th, 1896, Mrs. Stuart signed another guarantee to the bank for $125,000, which included the previous $100,000. This had been arranged at a meeting between Mr. Stuart, Mr. Bruce, and Mr. Macnider, an official of the bank. The other charges were created by Mrs. Stuart at her husband's instigation. Ultimately the whole of her property was transferred to the bank.

In 1901, the company went into liquidation.

After stating the above facts, somewhat more at length, the judgment proceeds as follows:—

The evidence was clear that in all those transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even

if she had desired to do so. She was ready to sign anything that her husband asked her to sign and do anything he told her to do. At the same time it was right to say that in her evidence she repudiated the notion that any influence was exerted or any pressure put upon her, or that her husband made any misrepresentation to her. She said she acted of her own free will to relieve her husband in his distress and that she would have scorned to consult anyone. She certainly knew that she was incurring liability in order to help her husband and the company in which he was interested. Her declarations in the course of her cross-examination that she acted of her own free will and not under her husband's influence merely showed how deep-rooted and how lasting the influence of her husband was. Proceeding, Lord Macnaghten said :—Such being the facts of the case can these transactions stand? Their Lordships accept the law as laid down by Vice-Chancellor Parker in Nedby *v.* Nedby (5 De G. & Sm., 377), to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it.

It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognized doctrine of Courts of Equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also, it must be added, by Mr. Bruce. Their Lordships do not attribute to Mr. Bruce intentional unfairness, but Mr. Bruce was in a position in which it would have been almost impossible for any man to act fairly. He was solicitor for the bank. He was the legal adviser of Mr. Stuart. He took upon himself to enter into negotiations with his fellow shareholders on behalf of Mrs. Stuart. Above all, he had, as the managers of the bank well knew, a strong personal interest in procuring Mrs. Stuart to give the guarantee. He knew that all Mr. Stuart's means were embarked in the company and no one knew better than he that unless some one came forward and guaranteed the bank in respect of further advances his own interest and the interest of his associates as shareholders were worth nothing and his claim as a creditor in all probability equally valueless. He and his associates other than Mr. Stuart were unwilling to risk their own moneys. Mr. Stuart had no money to risk. The game Mr. Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs. Stuart or the interest of Mr. Stuart could have advised Mrs. Stuart to act as her husband told her to do. The bank left everything to Mr.

Bruce and the bank must be answerable for what he did. Mr. Bruce undertook a duty towards Mrs. Stuart, but he left her in a worse position than she would have been if he had not interfered at all. His course was plain. He ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so.

It has been laid down in the House of Lords that the husband's solicitor owes a duty to the wife in transactions between the husband and wife where her interests are concerned. "I think," said Lord Davey in Willis *v.* Barron, [1902] A.C. 283, "it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is *primâ facie* entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman."

That observation seems to apply with peculiar force to a case like this where the solicitor takes upon himself to intervene on behalf of the wife.

Their Lordships are of opinion that the order of the Supreme Court of Canada is right, though they are unable to concur in the reasons on which that order is founded, and they will humbly advise his Majesty that the appeal should be dismissed with costs.

[IN THE COURT OF APPEAL.]

## SOCIÉTÉ COLONIALE ANVERSOISE AND OTHERS *v.* LONDON AND BRAZILIAN BANK.

Reported. [1911] 2 K.B. 1024. 17 Com. Cas. 1.

*Agent's Account—Revocation of Agency—Disposal of Balance.*

In this action the plaintiffs sought to recover from the defendants the sum of £772 8s. 0d., being the unexpended balance of a sum given by the plaintiffs to the defendants under the following circumstances :—

On April 3rd, 1909, the plaintiffs had written to the defendants as follows :—" In future the amounts we shall remit to you to be cabled out to your branch office at Rio de Janeiro for the disposal of Messrs. Haupt and Co. [who were the plaintiffs' agents in Brazil] must partly be held at the disposal of these gentlemen and partly to the disposal of our managing director on the mines, Mr. Ludwig Kloz. We shall always indicate you which amount is for Mr. Kloz and which amount is for Messrs. Haupt and Co."

On April 30th the plaintiffs sent a number of cheques to the defendants with a letter instructing them to " cable this amount out to your branch office at Rio de Janeiro with instructions to hold (1) at the disposal of Messrs. Haupt and Co. at Rio de Janeiro the sum of £2,000, (2) at the disposal of Mr. Ludwig Kloz £2,600, together £4,600, and then we wish these gentlemen to have the control of this sterling amount."

The defendants on May 1st telegraphed their Rio branch :— " Advise and pay Haupt and Co. £2,000 account Société des Mines de Manganese d'Ouro Preto as usual. Advise and pay Ludwig Kloz £2,600."

The Rio branch thereupon opened an account in the name of Kloz. The learned judge doubted whether this was the right course to adopt in pursuance of the defendants' instructions; he interpreted the latter as meaning that the moneys were to be drawn on by Kloz directly, and not through the medium of an account opened with him.

Three similar remittances were made and paid by the Rio branch into Kloz's account. No sums were ever paid in by Kloz himself, but he drew out from time to time certain sums. The

receipt for any of such sums expressed that he received the money on account of the plaintiff company. At the beginning of August, 1909, Kloz was dismissed by the plaintiffs, and, as the learned judge held, ceased to have any right to draw further sums from the moneys remitted. The credit balance on the account was then £772 8s. 0d.

On August 6th, plaintiffs wrote to defendants, confirming a telegram they had sent that day as follows :—" Cable immediately stop all payments Kloz for our account and transfer amount to credit Haupt."

The defendants replied that they had cabled to their Rio branch as follows :—" Stop payment all amounts Kloz for account of Société des Mines de Manganese d'Ouro Preto. Transfer to the credit of Haupt."

On August 7th, the defendants' Rio branch wrote to their London office that they had transferred the balance of Kloz's account to the credit of the plaintiffs. On August 27th, the defendants informed the plaintiffs of this.

As to the state of affairs at this stage, Mr. Justice Scrutton, who tried the case, says as follows :—

" In my view, the position taken by the defendants at this time was the correct one. A principal who had furnished money on which a person whom the bank knew to be an agent was to draw for the purposes of his agency, revoked the agency, and requested the bank to hand over the undrawn balance. I am unable to understand on what principle the bank can refuse to pay the balance to the principal who furnished them with the money and claim to pay it to the agent whose authority to draw has been revoked."

The subsequent proceedings are then dealt with by the learned judge as follows :—" Kloz, however, protested to the Rio branch, and on August 12th he wrote : 'I am in receipt of your favour of 9th instant in which you inform me that you had transferred the balance of my current account amounting to Rs.12,468$500 to the account of the Société Anonyme des Mines de Manganese d'Ouro Preto. I cannot conform to this, and claim that this sum standing to my credit in personal name can only be retired by myself and consequently request you to hold this amount at my disposal until I have settled matters with the above company.' "

Then the bank changed their mind and declined to pay their money to the plaintiffs. On August 17th the Rio branch wrote to the London office : -" Referring to ours of the 7th August, we have received a letter from Mr. L. Kloz, as per enclosed press copy, protesting against the balance of his account being transferred to the Société Anonyme des Mines de Manganese d'Ouro Preto. As the payments, as far as we are concerned, were ordered

in favour of Ludwig Kloz and credited to an account opened with us in his private name, the company cannot recover the amount without his consent or without judicial intervention. Mr. Kloz informs us that he does not wish to cause us any unpleasantness, but objects to us returning the money until he has settled accounts with the company. Will you please inform the company that we have reversed the entries referred to in our letter of 7th instant and that we shall find it difficult to refuse payment of the amount to Mr. Kloz should he at any time claim it? If the company still insist on recovery of this sum they must send their representatives at Rio a power of attorney to legally embargo the amount and so relieve us of all responsibility in the matter."

On October 18th, after considerable correspondence, which I need not read, the defendants in London wrote to the plaintiffs :— " We can only refer you to our letter of 6th ulto., transcribing an advice received from our Rio de Janeiro branch giving the only legal method by which you can be empowered to receive the balance of Mr. Kloz's account. The funds were specifically transferred by you to Mr. Kloz personally, and as we have strictly carried out your instructions we cannot accept any responsibility in the matter." Kloz since then to this day has never attempted to draw on the money nor has he taken any legal proceedings in Brazil to stop the bank paying it to the plaintiffs, or to obtain it, but he did in January, 1910, take proceedings in Belgium in which he claimed certain expenses and commissions, but gave no credit for this balance at Rio."

And he comes to the following conclusions :—

In my view the plaintiffs are entitled to judgment. I see no justification in their instructions for the bank's opening an account in Kloz's name; they are to allow him to draw on a sum provided by the plaintiffs. But if these instructions are not sufficiently precise to prevent them from opening an account in his name in my opinion it makes no difference. When a principal places money in the bank on the terms that a known agent shall draw upon it he retains, in my view, the power, if he rightly determines the agency, to require the bank to return the undrawn balance to him.

" Certain cases were referred to at the hearing, of which Tassell *v.* Cooper (9 C.B., 509) was mostly in the plaintiff's favour, while Sims *v.* Bond (5 B. and Ad., 389) (see *per* Lord Denman at p. 392) and Calland *v.* Lloyd (6 M. and W., 26) appeared against them. But it is to be observed that in Tassell *v.* Cooper the agent had paid certain money into his general account; the bank's contract was, therefore, with him and not with his employer, to whom he ought to have paid the money. In the present case it is the employer who has paid all the money

into the agent's account and has withdrawn the authority to draw of the person whom the bank knew from the first to be an agent. There must be judgment for the plaintiffs, with costs."

The defendants appealed. The court of appeal dismissed the appeal. Vaughan Williams, L.J., said he agreed with the conclusion arrived at by Scrutton, J., where he said that he saw no justification in their instructions for the bank's opening an account in Kloz's name, they were to allow him to draw on an account provided by the plaintiffs.

Buckley and Kennedy, L.JJ., concurred. Appeal dismissed.

*Note.*—This case is only an authority on the point on which it was decided. Had the plaintiffs authorized the opening of an account with Kloz in his own name, paid the money into it, and authorized Kloz to draw on it, it seems probable that the result would have been different.

[IN THE HOUSE OF LORDS.]

## FARMER *v.* SCOTTISH NORTH AMERICAN TRUST.

Reported. [1912] A.C. 118.

*Income Tax on Bankers' Loans.*

THE case turned upon the point whether a person making a return of profits for income tax may properly deduct interest paid to his bankers in America on loans made by them for temporary purposes, and the House of Lords decided in the affirmative. The interest to English bankers lies in the fact that Lord Atkinson, in his judgment, approved the decision of the Court of Appeal in Gosling and Sharpe *v.* Blake (23 Q.B.D., 324): "that interest upon a loan by a banker to a customer for a period of less than a year did not fall within the words 'any yearly interest of money or any annuity or other annual payment' occurring in 16 and 17 Vict., cap. 40," and that therefore a banker is not bound in such cases to deduct the tax from the interest charged to the customer.

The question frequently arises in practice, and it may therefore be desirable to recall Lord Lindley's words in giving judgment in that case in the Court of Appeal:—"The ordinary form of mortgage contains a covenant to repay the loan in six months, and if not then paid a covenant to pay interest until the loan is repaid. Those are short loans; but in fact, as men of business, we know perfectly well that, except in exceptional cases, money lent on mortgage is very seldom repaid at the end of six months, the mortgagee usually being content with his security and receiving his interest half-yearly. . . . In point of business, therefore, a mortgage is not a short loan; but a banker's loan at three months is a totally different thing. That is a short loan, it is intended and understood to be a short loan, and the difference in practice between the two is perfectly well known to every business man."

*Cf.* Garston Overseers *v.* Carlisle, Surveyor of Taxes, [1915] 3 K.B. 381 and under that heading, *post*, p. 129, as to interest on daily balances.

[IN THE HOUSE OF LORDS.]

## KERRISON *v.* GLYN, MILLS, CURRIE AND CO.

Reported. 28 Times L.R. 106. 17 Com. Cas. 41. Journal, Vol. XXXIII, p. 34.

*Money Paid under Mistake of Fact.*

THIS was an appeal by the plaintiff from an order of the Court of Appeal (Lords Justices Vaughan Williams, Moulton, and Farwell) which reversed the decision of Mr. Justice Hamilton giving judgment for the plaintiff. These stages of the case will be found reported in the Journal for December, 1909, and for June, 1910; also in "Legal Decisions Affecting Bankers," Vol. II, p. 243.

Lord Atkinson read a long judgment hereinafter quoted and embodying the correspondence.

Lord Halsbury concurred, and said that there was no real difference with the Courts below in law, but only a difference of inference from the facts.

Lord Shaw, in the course of his judgment, said the narrative of the facts in the case stated by Mr. Justice Hamilton and the conclusions in law reached by that learned Judge were, in his opinion, correct; and he agreed with the full judgment of Lord Atkinson.

That judgment was to the following effect:—

On October 31st the appellant, Mr. Kerrison, paid £500 to Messrs. Glyn, Mills, Currie and Co., the London correspondents and bankers of the firm of Kessler and Co., New York. The object of the payment was to cover accommodation or advances to be made by Messrs. Kessler to an American firm called Bote and Co. On that date, October 31st, Messrs. Kessler and Co. stood completely disabled from making such advances or giving such accommodation, and could not honestly have taken the money for the purpose, for the reason that on the previous day they had filed a deed of assignment in favour of their creditors and had closed their doors. The money was paid, however, in London under the mistake in fact, which was material, and was indeed the only reason for payment, that Kessler and Co. could perform their obligations. In his Lordship's opinion it was of

no materiality whether this payment under mistake to Messrs. Kessler was made either directly or indirectly, either to them personally, or to any agency of theirs in New York or in London.

The case was only of importance on account of an able attempt by the respondents' counsel to distinguish the position of a banker from the position of any other recipient of money acting as factor or agent, and to attach the authority of this House to such a distinction as applicable to a case like the present. It was for this purpose that the *dictum* of Lord Cottenham in Foley *v.* Hill (2 Cl. and Fin., 28) was so strongly founded on. That *dictum* was not capable of the application suggested. In the first place it was pronounced, and indeed the case turned, on a point of procedure, or rather in regard to the respective jurisdictions of a Court of Law and a Court of Equity. This was expressly referred to by the Lord Chancellor when he described the argument :—" Although it is not disputed that the transactions between the parties gave the legal right, it is said a Court of Equity, nevertheless, has concurrent jurisdiction." In the second place, when the general language founded upon, to the effect that " money when paid into a bank ceases altogether to be the money of the principal," and so forth, was used, it was plain that that language was employed solely in regard to the relation between a banker and his own customer. And in the third place, it was not meant to be applied, and did not apply, to, or cover the case of, money paid, whether by a customer or not, under a mistake in fact.

His Lordship agreed with the opinion that money so paid could be successfully redemanded. And he did not think that it would be correct, either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained. This rule applied generally, even although the recipient, whether banker or agent, was, as here, ignorant at the time of receipt of the disability of the principal to do the thing for which, and for which alone, the money was deposited, or was himself under a mistaken impression on that subject.

Lord Mersey read a brief judgment of concurrence, in the course of which he said that the facts brought the case directly within the terms of the judgment of Lord Loreburn in Kleinwort *v.* Dunlop (97 Law Times, page 294), where he says :— " It is indisputable that if money is paid under a mistake of fact and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received." An attempt had been made to take the case out of this plain and

simple rule of law by saying that the defendants, being Kessler and Company's bankers, had, by the receipt of the money, become debtors of Kessler and Company, and could not, therefore, be called upon to repay the plaintiff. This, in his Lordship's opinion, was a fallacy. If, indeed the banker had paid over the money to his customer or had altered his position in relation to his customer to his detriment, on the faith of the payment, the banker might refuse to pay the amount, and might leave the person who had paid him to enforce his remedy against the customer. But the circumstances here were that Messrs. Glyn and Company had in no way altered their position when they were asked to refund the money. They held money which they ought not to retain because it had been paid to them under a mistake of fact, and, in the words of the Lord Chancellor, it did not matter in what character it was received by them.

Appeal allowed.

*Note.*—This case should be read in conjunction with Kleinwort Sons and Co. *v.* Dunlop Rubber Co., Ltd., Legal Decisions, Vol.II, p. 154. There, as in the present case, though not referred to above, the account into which the money was paid was largely in debit. But in neither case was it proved that the reduction of the overdraft had been the ground of any further advance, and it was held the mere reduction of the overdraft was not sufficient alteration of position. Nor could it be set up as against money paid in by mistake. In the Kerrison case, there would seem to have existed the further element that the money was paid in, not only in mistake of fact, but also in substance for a purpose which proved impracticable.

The latest and a very lucid exposition of the law as to money paid by mistake will be found in the judgment of Scrutton, L.J., in Holt *v.* Markham, [1923] 1 K.B., 514, *post*, p. 298. As to money paid on negotiable instruments in mistake of fact see note to Morison *v.* London County and Westminster Bank, *post*, p. 91.

The principal case is valuable as an exposition of the limitations of Foley *v.* Hill. That case is frequently vouched as an authority for the proposition that money paid into an account at a bank loses all identity, ceases to be money, is thenceforward nothing but a debt from banker to customer, the obligation to discharge which by payment of cheques relieves the banker from any responsibility to a person who has paid it in under mistake of fact. Such was the contention in Admiralty Commissioners *v.* National Provincial and Union Bank, *post*, p. 260. But, as pointed out in that case and, inferentially, in this, that obligation does not extend to money to which the customer himself would have no just claim. Foley *v.* Hill only establishes

that, as between banker and customer, the money is not impressed with any trust so as to entitle the customer to question the banker's dealings with it.

Nor can any expressions in Joachimson *v.* Swiss Bank Corporation, [1921] 3 K.B., 110, *post,* p. 233, be strained so as to give wider effect to Foley *v.* Hill.

[IN THE KING'S BENCH DIVISION.]

## STACEY AND CO. (LIMITED) *v.* WALLIS AND OTHERS.

28 Times L.R. 209. Journal, Vol. XXXIII, p. 174.

*A Company's Acceptance.*

THIS was an action brought by Messrs. Frank Stacey and Co. (Limited), carrying on business as manufacturers of machinery at Birmingham, to recover £163 3s. 10d. from Mr. James Wallis, Mr. Thomas H. Wallis, and Mr. Henry Bowles, as acceptors of a bill of exchange. It appeared that in September, 1911, the plaintiffs supplied certain machinery to Messrs. J. and T. H. Wallis (Limited), Wandle Roller Flour Mills, Beddington, Surrey. The bill was drawn by the plaintiffs and addressed to Messrs. J. and T. H. Wallis ("Ltd."), Beddington, Surrey. The acceptance was in the following form: "Accepted payable at the London and County Bank, Croydon Branch. James Wallis, Thomas H. Wallis, and Henry Bowles, secretary." The two first-mentioned gentlemen were directors of the company. Mr. J. B. Matthews appeared for the plaintiffs, and Mr. H. A. McCardie for the defendants.

Mr. Justice Scrutton said the case raised a commercial point of some interest. The company, J. and T. H. Wallis (Limited) had gone into liquidation, and therefore any attempt to make the company liable by suing them as acceptors of the bill would probably not result in any substantial benefit being recovered. Therefore the plaintiffs endeavoured to make liable the three persons whose names appeared as acceptors on the bill. Mr. Matthews agreed that he could not make the defendants liable on the bill because a bill addressed to A could not be accepted by B, so as to make B liable as acceptor. But he endeavoured to make them liable under the Companies Consolidation Act, 1908. Sec. 63, sub-sec. (3) of that Act provided that if any director or officer of a limited company signed any bill of exchange wherein the company's name was not mentioned in the manner aforesaid, he should be personally liable to the holder of any such bill of exchange for the amount thereof unless the same was duly paid by the company. The words "wherein its name is not men-

tioned " referred to sub-sec. 1 (*c*), which said that every limited company " shall have its name mentioned in legible characters." Mr. Matthews said first that the words " Wherein its name is not mentioned " and " shall have its name mentioned . . . in all bills of exchange " mean that the company shall have its name mentioned in that part of the bill which is added by the person purporting to deal with it on behalf of the company, and therefore that there must be a mention of the name of the company in the acceptance written on the bill by the persons accepting for the company, and that it was not sufficient that there was a mention of the name of the company in the part written by the drawers. On the words of the old Act there was a good deal to be said for that contention, but, as was frequently the case in codifying Acts, the wording had been so altered as to destroy, in his Lordship's view, any chance of arguing that point. The language now was " shall have its name mentioned in all bills of exchange." Consequently, under the Act of 1908, he thought it was sufficient if the correct name of the company appeared in the address added by the drawer, even if it was incorrectly stated in the acceptance by the person writing the acceptance. Even under the old Act there was authority which he thought would have bound him to hold that the result was the same. Mr. Matthews further argued that even assuming that the name of the company and the address were sufficient, the name in this case was not correctly stated in the address, for whereas the name of the company was " Limited " this address only had the abbreviation " Ltd." Mr. Matthews drew with all the eloquence at his command a lively picture of a foreigner seeing the letters " Ltd." and remaining in ignorance of what was meant by so extraordinary an abbreviation. He supposed the decision in this case might be taken as deciding the point whether " Co." instead of " Company " was a wrong description. In his view it might be different if the abbreviation were " L " or " Li," but " Ltd.," using ordinary knowledge of commerce, was such a constant abbreviation that every commercial man of intelligence would know " Limited " was meant. It was not necessary for his Lordship to decide in this case whether, in consequence of his decision, the company was liable, but he was inclined to think it was. If acceptance was by a person having authority to accept on its behalf, the company was liable. He thought that the signature, with the word " Secretary," indicated that they were accepting on behalf of the company. If the two first signatures had had the word " directors " after them he should have had no doubt about it, but he was inclined to think that even with the word " Secretary " the company was liable. The plaintiffs failed, and there would be judgment for the defendant, with costs.

*Note.*—The learned judge's view that the company could in any event be liable on an acceptance in this form seems open to question. Sec. 77 of the Companies (Consolidation) Act, 1908, says: —"A bill of exchange shall be deemed to be accepted on behalf of a company if accepted in the name of or by or on behalf or on account of the company by any person acting under its authority." It seems clear that to bind the company, its name must occur in the signature which purports to be its act by deputed authority. *Cf.* Landes *v.* Marcus, Legal Decisions, Vol. II, p. 203; Chapman *v.* Smethurst, *ib.*, p. 183.

[IN THE COURT OF APPEAL.]

## WAUTHIER *v.* WILSON AND ANOTHER.

28 Times L.R. 239. Journal, Vol. XXXIII, p. 249.

*Joint Promissory Note of Minor and his Father.*

THIS was an appeal by the defendant, Mr. R. F. McD. Wilson, from the judgment of Mr. Justice Pickford giving judgment for the plaintiff.

The action was brought against two defendants, father and son, on a joint and several promissory note given by them in respect of a loan made by the plaintiff to the son, who was under age at the time when the money was handed to him. It appeared that in all probability the plaintiff knew the fact that the son was under age. The father joined in the promissory note in order to facilitate the transaction, understanding that the debt would be paid when his son came of age. The defence of the father was that he had signed the note as guarantor, and that, inasmuch as by the Infants Relief Act, 1874, the transaction of loan to the son was void, the contract of guarantee was void also, because there could not be a guarantee of a debt which was void and consequently no debt. Pickford, J., held that the father was liable as guarantor.

The Court dismissed the appeal.

Lord Justice Farwell said this was an appeal from a judgment of Mr. Justice Pickford, and he should have been sorry if the Court had felt itself bound to reverse that judgment. A father and son had signed a joint and several promissory note, on which, on the face of it, both were jointly and severally liable. The son, however, was an infant. The father, of course, knew that, and, as he (the Lord Justice) thought, the lender knew it also. But it was immaterial whether the lender knew it or not, as, in his opinion, either way the appeal failed. He would assume that all parties knew that the son was under age.

On the action being brought on the promissory note given under these circumstances, the father had no defence at common law, but since the Common Law Procedure Act an equitable plea might be raised in such a case on the ground that the circumstances were such that the Court of Chancery would have re-

strained the action as being against conscience. In the Mutual Loan Fund Association *v.* Sudlow (5 C.B., N.S., at p. 453), Mr. Justice Byles said: —" As between the makers and the payees of the note, at law both the makers are principals, and evidence would not be admissible to show that one of them signed the instrument as surety. But in equity, if it be made to appear that the lender was cognisant of the circumstances, you may show what the fact is. They become joint principals, or principal and surety, according to the facts."

It was perfectly true, as had been contended, that there could be no surety without a principal, and the son, being an infant, could not enter into a contract so as to make himself liable as principal; but if the contention that this was a case of a guarantee were to prevail it would follow that these three parties deliberately sat down to enter into an arrangement under which money was to be advanced on a promissory note on which no one was liable at all, there being no one liable as principal and therefore no one liable as surety. To argue that that could give rise to an equity seemed to him to be a gross libel on equity. If the nature of the transaction were as suggested the father could not, in his opinion, have maintained a bill in Chancery to restrain the action, and his equitable plea would come to nothing at all. But in his (the Lord Justice's) view the money was advanced by the plaintiff to the son at the father's request. The father desired that money should be advanced to his son for some purpose of which he approved, and, being without money himself, he requested the plaintiff to make an advance. That seemed to him to be the plain meaning of the transaction, on the assumption that the plaintiff knew that the son was under age; and it followed that, in his opinion, the father acted as principal and incurred liability as principal.

The case would be plainer still if the plaintiff did not know that the son was under age; for if he did not know it, and the father knew that he did not know it, the transaction would look like fraud. It was not necessary to consider the authority of the case of Yorkshire Railway Wagon Company *v.* Maclure, on which Mr. Justice Pickford based his judgment, because this Court thought that this was not a case of a guarantee. The learned Judge said that, in his opinion, the father joined in the promissory note as a guarantor. In a colloquial sense, no doubt, this was a case of a guarantee. But in his judgment the true meaning of the transaction was that the father acted as principal borrower and made himself liable as principal. The appeal must therefore be dismissed.

Lord Justice Kennedy and Mr. Justice Warrington concurred.
Appeal dismissed.

*Note.*—The view taken by the Court of Appeal seems to be the sounder basis for arriving at a desirable conclusion. The long series of cases from Steele *v.* M'Kinlay, 5 A.C., 754 to McDonald *v.* Nash, 40 Times L.R., 530, *post*, p. 331, difficult as they are to reconcile in some respects, agree at least in one point, viz., that a man's name on a bill is not a sufficient memorandum of a guarantee to satisfy the Statute of Frauds, and that oral evidence cannot be imported into the matter. In the present case, as pointed out by the Court of Appeal, the father was, on the face of the note, a principal and there was obviously no equity at the back of his plea that he signed as guarantor of a debt which he now contended never existed.

[IN THE KING'S BENCH DIVISION.]

## CAR AND GENERAL INSURANCE CORPORATION *v.* BRITISH MOTOR CAB CO.

Journal, Vol. XXXVIII, p. 316.

*Sending Cheques by Post.*

THIS case raised the question of the liability of persons sending cheques through the post in case of non-delivery. The course of business between the parties was such that the judge directed the jury that they would have no difficulty in finding that there was a request by the creditor to send a cheque by post. If that request was strictly complied with the loss would fall on the creditor. *Cf.* Pennington *v.* Crossley, 13 Times L.R., 513; Mitchell Henry *v.* Norwich Union, 34 Times L.R., 77.

In the present case, the plaintiffs sent an open cheque, though the previous practice was acknowledged to have been to cross the cheques before sending them. Was this such a compliance with the creditor's request as to exonerate the debtor? The jury decided that it was not, and that the loss must fall on the Motor Cab Co., who sent the open cheque.

[IN THE KING'S BENCH DIVISION.]

## *In re* H. G. TEALE. *Ex parte* H. G. BLACKBURN, THE TRUSTEE, *v.* THE UNION OF LONDON AND SMITHS BANK.

Reported. [1912] 2 K.B. 367. 19 Mans. Bankruptcy Reports, 327. Journal, Vol. XXXIII, p. 392.

*Effect of Antedating Receiving Order on Appeal.*

THE facts appear sufficiently in the judgment.

JUDGMENT.

MR. JUSTICE PHILLIMORE: This is a joint judgment of my brother Bray and myself. This is an appeal from the decision of the County Court Judge refusing to order the Union of London and Smiths Bank to pay to the trustee in bankruptcy the sum of £210 representing various sums of money which the bankrupt had paid to the bank between the 22nd July and the 24th October, 1910, the first date being that on which the County Court Registrar ought to have made a receiving order, and the later date being that on which the Divisional Court reversed the decision and made a receiving order and ordered it to be dated in accordance with practice back to the 22nd of July, the day when it ought to have been made.

If the date of the receiving order is to be deemed for all purposes to be the 22nd July these payments and the corresponding payments made by the bank on the bankrupt's cheques are not protected by sec. 49, which relates only to transactions made before the date of the receiving order. Nor do they come under the class of dealings with the bankrupt after adjudication which may be protected under the doctrine of Cohen *v.* Mitchell, 25 Q.B.D., 262.

As regards transactions between receiving order and adjudication there is singularly little authority. We do not mean to decide, as it will not be necessary to decide, whether there is any protection for such transactions, but we incline to think there is none. And yet it may often happen that the interval of time is considerable.

The case of *Re* Montague, 4 Manson, p. 1, and 76 Law Times, 203, where an application against a bank was refused, might,

according to the reports, appear to be a decision that there is protection for dealings after the receiving order. But, in fact, as Mr. Registrar Hope has been good enough to elicit for us, the payments attacked were all made on or after the date of adjudication. The receiving order in that case was on the 25th of September, the adjudication was on the 9th October, and the three sums paid in were as follows :—October 9th, £12; October 12th, £200; December 4th, £4.

Putting this question aside, there are two points to consider :

(1) Is the practice of dating back receiving orders a sound one?

(2) If so, what is the effect upon third parties?

The practice by which the Court of Appeal, when it makes the receiving order which the Court of first instance has refused to make, date back to the date when the Court of first instance should have made it is well established. It may have been inaugurated by Mr. Justice Vaughan Williams and Mr. Justice Wright in the case of *Re* Raatz, 4 Manson, 50. It has been followed pretty generally ever since, always under the direction of the Court. A comparatively recent instance where the Court of Appeal has done so is the unreported case of O'Shea, where, by an order of the 14th July, 1911, a receiving order was made and dated back to the 15th of June, on which date it ought to have been made. We think it must be taken as sound. If the debtor ought to have had a receiving order made against him by the Court of first instance, any conduct of his previous to the date of this order will be punishable or taken into account in considering his discharge upon the principle that the *terminus ad quem* in the matter of date shall be the date upon which he ought to have had the receiving order made against him. If there are any cases where those who had previously dealt with the debtor would be affected by the ante-dating of the order, these cases may have to be considered. Our present judgment does not affect to deal with them.

But it is quite another matter when one has to consider the interests of third parties which have accrued in an interval of time which ought never to have come into being, that is, between the date when the receiving order ought to have been made by the Court of first instance and that when it was made by the Court of Appeal. These third parties have done nothing wrong, have not procured this improper interval, and have had no improper dealings. The man with whom they dealt had not had a receiving order made against him when they dealt with him and the *ex post facto* determination that there should have been a receiving order was made in a proceeding to which they are not parties and cannot affect them. We think it cannot have

been intended that these parties should be affected by the antedating of the order, and that the order should not be read as affecting such parties.

Therefore, we think this appeal fails, and must be dismissed with costs.

*Note.*—This point does not seem to have been expressly dealt with by the Bankruptcy Act, 1914.

The consideration here extended to the rights of innocent parties affected by manipulation of the receiving order by the Court has not been extended to the equally serious case of bankers who have paid out money on the cheques of a customer after receiving order made against him, the publication of such order having been suppressed by the Court at the instance of the customer. See *Re* Wigzell, [1921] 2 K.B., 835, *post*, p. 240.

The reference to " the class of dealings with the bankrupt after adjudication which may be protected under the doctrine of Cohen *v.* Mitchell " may either mean that the money in question was not after-acquired property, or that the payments in and out on cheques were not the class of dealing which would be protected even in the case of after-acquired property. Anyway, the whole matter must now be looked at in the light of the Bankruptcy Act, 1914.

Careful comparison of secs. 45, 46, and 47 of that Act will demonstrate that payment of money by a banker on the bankrupt's cheques, save to the bankrupt himself, is bad as against the trustee, not only when a receiving order has been made, but even when an act of bankruptcy has been committed, of which the banker has no notice, but on which a receiving order is subsequently made. Payment of the cheque to a third party payee or subsequent holder is not a payment or delivery to the bankrupt; it is not a contract, dealing or transaction with him for valuable consideration within sec. 45, nor is it a payment of money to a person subsequently adjudicated bankrupt or to a person claiming by assignment from him within sec. 46. A cheque is not an assignment of the money. Bills of Exchange Acts, sec. 53; " Williams on Bankruptcy," 12th Edition, 309. The payee or holder does not *claim* from the banker.

And the matter is clinched by sec. 47 (1), which provides that " for the purposes of this sub-section [that is where after-acquired property is concerned] any payment made to or by the order or direction of a bankrupt by his banker *shall be deemed* to be a transaction by the bankrupt with such banker dealing with him for value."

This clearly involves that payment of cheques to parties other than the bankrupt is outside the other two sections. It,

however, extends the Cohen *v.* Mitchell doctrine to this "class of dealings."

There seems no particular reason why the banker who has notice of an act of bankruptcy but not of a petition should be protected if he allow the customer to withdraw his whole credit balance, but not if he pays that customer's cheque to a third person. As, in the first case, the banker gets a good discharge under sec. 46, it is not easy to see how he could refuse to pay the money to the customer himself, when demanded.

[IN THE HOUSE OF LORDS.]

## EDINBURGH CORPORATION *v.* BRITISH LINEN BANK.

Reported. [1913] A.C. 133. Journal, Vol. XXXIII, p. 529.

*Redeemable Stock.*

THE facts of the case were as follows :—The Edinburgh Corporation Stock Act, 1894, gave the Corporation the right by resolution to exercise their borrowing powers by the creation of redeemable stock, and further stipulated that the resolution should provide for the stock being redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding 60 years from the first creation of the stock. Accordingly in May, 1897, the Corporation resolved to issue £750,000 2½ per cent. stock, redeemable at par after the expiration of a period of 30 years from May 15th, 1897, and the certificates contained a note that the stock was redeemable at par after Whitsunday, 1927.

The British Linen Bank, as the holders of £254,000 of the stock, brought an action for a declaration that the Corporation were bound to redeem the stock at the request of the holders immediately after May 15th, 1927, but the House of Lords declined to grant the declaration, and held that the term "redeemable" meant redeemable at the option of the Corporation, and that the latter were under no obligation to redeem.

"Anyone who alleges that a redeemable stock must be redeemed," said Lord Halsbury (quoting Lord Skerrington) is bound to show the existence of the obligation upon which he founds, and this the pursuers have failed to do."

*Note.*—This decision appears in accordance with the correct grammatical and derivative meaning of the word "redeemable," but the impression that the stock would infallibly be redeemed at or after the appointed date might well be conveyed to the ordinary mind by the use of the term.

[IN THE HOUSE OF LORDS.]

## DEELEY *v.* LLOYDS BANK LTD.

Reported. [1912] A.C. 756. 29 Times L.R. 1. Journal, Vol. XXXIII, p. 551.

*Rule in Clayton's Case.*

A CUSTOMER of the respondent bank mortgaged his property to the bank to secure an overdraft limited to £2,500. He then mortgaged the same property to the appellant for £3,500, subject to the bank's mortgage. The bank on receiving notice of this further mortgage did not open a new account, but continued the old current account. The customer thereafter paid in moneys which at a particular date, if they had been appropriated in accordance with the rule in Clayton's case (1 Mer., 572), would have extinguished the bank's mortgage. The customer's property was sold by the bank for a sum sufficient to satisfy the bank's debt, but not that of the appellant.

*Held*, that the evidence did not exclude the operation of the rule in Clayton's case (*ante*), which must be applied.

Decision of the Court of Appeal ([1910] 1 Ch., 648; 79 L.J. Ch., 561), Legal Decisions, Vol. II, p. 230, reversed.

This was an appeal from an order of the Court of Appeal (Lord Justice Fletcher Moulton and Lord Justice Buckley; the Master of the Rolls dissenting) affirming an order of Mr. Justice Eve.

The question was whether the appellant's mortgage on the property of John Glaze was entitled to priority over the mortgage of the respondent bank to secure a current account with the bank.

The facts are fully set out in the following judgments.

Lord Atkinson: The facts in this case are in the main not in dispute; it is upon the proper inference to be drawn from them that the controversy arises.

One John Glaze, the owner of ironworks at Brierley Hill, Dudley, called the Brockmoor Works, which were valued at a high figure, and of which he apparently entertained high hopes, executed three mortgages of them. The first was dated August 25th, 1891, for £2,500; the second September 21st, 1893, for £2,500; and the third October 19th, 1895, for £3,500. The first of these mortgages was, on March 22nd, 1899, assigned to the

respondents, and this litigation is not concerned with it. Glaze was a customer of the local branch of the respondent bank, of which one George Wilkinson was the manager. From a copy of Glaze's pass book, it appears that on December 31st, 1892, there was a debit balance against him of £687 6s. 10d., and on June 30th, 1893, a similar balance against him of £920 8s. 3d. To secure this current account to the amount of £2,500, Glaze made to the bank the second mortgage, which I shall refer to as the bank mortgage. It contained a covenant by Glaze that the mortgagor would pay on demand, or, if no demand should be made in his lifetime, that his representatives would pay upon his death to the respondents the balance then owing by him on his current account with the respondents for cheques, notes, or bills drawn, accepted, or endorsed by him, or for advances made to him or for his accommodation or benefit or otherwise howsoever, with interest, with half-yearly rests, commission, and customary charges. I concur with the Master of the Rolls in thinking that this was an ordinary bank mortgage to secure a current account. From first to last Glaze's account with the bank was kept as an ordinary current account, balances being struck half-yearly on June 30th and December 31st in each year. The pass-book, duly posted up from time to time, was sent to Glaze, who returned it without objecting to the form the account took. Owing to some mistake which was not explained, this mortgage was for some time taken by the bank to be a security for the whole of Glaze's overdraft, then amounting to between £3,000 and £4,000, and not for the amount plainly stated in it in so many words—namely, £2,500. The debit balance against Glaze on June 30th, 1895, amounted to £3,872 1s. 8d.

The third mortgage, though dated on October 19th, 1895, was not executed till December 2nd following. It was a mortgage from Glaze to Mrs. Deeley, his sister, for £3,500, and included, in addition to the Brockmoor premises, all the book debts due to Glaze, amounting nominally to between £2,000 and £3,000. Frank Deeley, the husband of Mrs. Deeley, who was Glaze's solicitor, gave on that day notice to the local bank of the execution of this mortgage.

The bank must have been fully aware of the effect of the receipt of a notice of the existence of a security of a later date than their own. And the manager, Wilkinson, must have fully known what was his duty with respect to it, for he produced in the witness-box a copy of the bank's rules for branch managers, of which the 14th runs as follows :—" Wherever notice is received of a second mortgage or second charge on any security on which the bank holds a prior charge, the account must at once be ruled off and a separate account opened for subsequent transactions." This rule he said was acted upon in his branch. Glaze's account was

not so ruled off. No new account was opened; on the contrary, to use Wilkinson's own words, it "was kept as a continuous current account" from the date of the mortgage to the bank downwards. In addition, Glaze, in the month of August, 1895, commenced to make specific appropriation of his lodgments with the bank. This continued down to January 13th, 1898. The appropriations in that period amounted in number to 134 or 136. No record was kept in any of the books of the bank of these special appropriations by Glaze. The current account is kept as if no such special appropriations had ever been made. Counsel for the respondents contends that this establishes that the mode in which the account was kept before the special appropriations commenced, as well as after they had ended, cannot be taken as any indication whatever of an intention on Wilkinson's part to deal with the payments during either of those periods on the principle laid down in Clayton's case (*ante*). I am quite unable to follow that line of reasoning. If it were sound it would lead to this strange result—that it would only be necessary for a creditor to omit all notice of a debtor's special appropriation in a current account to rebut the inference that is *primâ facie* to be drawn from the fact of keeping accounts at a date anterior to the appropriation as current accounts.

In Clayton's case (*ante*) at page 610, the Master of the Rolls is reported to have spoken thus :—"If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished. If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, 'Leave this balance altogether out of the running account between us'—or 'always enter your payments as made on the credit of your latest receipts, so that the oldest balance may be the last paid.' Instead of this he receives the account drawn out as one unbroken running account. He makes no objection to it; and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation." Bodenham *v.* Purchas (2 B. and Ald., 39) and Simson *v.* Ingham (2 B. and C., 65) are to the same effect. In Royal Bank of Scotland *v.* Christie (8 Cl. and F., 214) the two surviving partners of a firm of three continued after the death of the third to deal with their banker in the same way as theretofore, no arrangement having been made to keep separate in the accounts the balance due to the bank at the death of this partner. At a certain date the payments made after the

death of the partner balanced the debt due by the firm at the time of his decease. It was held that the separate estate of the deceased partner was by this payment discharged. The Lord Chancellor (Lord Cottenham) is reported, at page 228 of the report, to have expressed himself thus :—" Such payments "—*i. e.* payments subsequent to the partner's death—" having been made without any appropriation by the parties paying, and having been carried by the partners receiving such payments to the account kept by them, consisting of the old and new transactions, and constituting, therefore, a continuing account, and from which appropriation it was not competent for the bank to remove such payment at a subsequent time when the consequences were seen; as was decided in Bodenham *v.* Purchas." (*ante*). In Sherry, *in re* London and County Banking Company *v.* Terry (25 Ch.D., 692; 53 L.J. Ch., 404), Lord Selborne thus states the rule in Clayton's case (*ante*) :—" The principle of Clayton's case (*ante*) and of the other cases which deal with the same subject, is this—that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *primâ facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account. It is, of course, absolutely necessary for the application of those authorities that there should be one unbroken account, and entries made in that account by the person having a right to appropriate the payment to that account."

It is no doubt quite true that the rule laid down in Clayton's case (*ante*) is not a rule of law to be applied in every case, but rather a presumption of fact, and that its application may be rebutted in any case by evidence going to show that it was not the intention of the parties that it should be applied. This was much insisted upon by the respondents, and the decisions in Henniker *v.* Wigg (4 Q.B., 792), City Discount Company *v.* M'Lean (L.R., 9 C.P., 692), and The Mecca (13 Times L.R., 339; [1897] A.C., 286; 66 L.J. P., 86), relied upon to show that, according to the principle laid down in them, Wilkinson could not be taken to have intended that the rule in Clayton's case (*ante*) should apply to Glaze's current account. The facts of each of these cases were very special. In the first a bond, not on its face a continuing security, was given by the several obligors to a bank as security for the debt of one of them. The statements and acts of the parties clearly showed that the bond was intended to be a continuing security. To have applied the rule in Clayton's case (*ante*) would, under the circumstances of the particular case, have defeated the common object of all the

parties. In the second case, though long debtor and creditor accounts were furnished by the creditor to the debtor, including amongst their items the original guaranteed advance, a balance being struck from time to time, yet, on the face of these accounts, it was shown that the credit items consisted to a large extent of trade bills, and, to a very considerable extent of the amounts, less discount and commission, of accommodation bills discounted by the bank for the debtor, many of them being current when the balance was struck; while the debit items included such of those latter bills as were dishonoured. Several of the bills were renewed at maturity, when the same system of debiting and crediting was adopted. The actual indebtedness of the customer always exceeded in amount the advance made by the bank on the security. In that case Baron Bramwell, as he then was, is reported to have said :—"They contemplated an advance of £5,000, and that the debt might continue for two years unpaid and unsatisfied; and they obviously contemplated subsequent dealings independent of and unconnected with the advance of £5,000. . . . With respect to the accommodation bills, it is clear they were nothing more than advances or renewals of advances. With respect to the trade bills, discounted after the advances, they were discounted on the terms that Southgate (*i.e.*, the customer) should have the proceeds and not that the proceeds should be applied in liquidation of the £5,000." In the last case no account current at all was kept between the parties. Lord Halsbury and Lord Herschell seemed to think this fact was by itself sufficient to show that Clayton's case (*ante*) did not apply, and Lord Macnaghten found in the facts of the case, and the correspondence which took place between the parties, clear evidence that the creditors who received the money payments never intended to give up their right to appropriate them as they pleased; but at the end of the passage cited from Lord Macnaghten's judgment there is another passage which runs thus :— "Where the election is with the creditor, it is always his intention, express or implied, or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction."

The only matter of substance relied upon by the respondents as "pointing in the opposite direction" in the present case is, as I understand the argument, this: It is said it never could be supposed that Wilkinson intended to postpone the bank's mortgage to Deeley's, thereby lessening the security of the bank. But the acquisition of priority for the latter security rests on the

receipt of the notice by the bank. Wilkinson had forgotten all about the notice. He never thought of the acquisition of priority by Deeley's mortgage, and it seems to me impossible for any human being to intend to bring about or retard a result which was never present in his mind at all. All he knew or remembered was that the mortgage of the bank stood No. 2 upon the list. Moreover, the application of the rule in Clayton's case (*ante*) would, in his state of ignorance of the real facts, have appeared to him quite harmless. There was, therefore, no reason why he should not intend and desire that that rule should apply.

There is therefore, in my opinion, nothing to rebut the presumption that the creditor in this case, the branch bank, by keeping Glaze's current account in the way they have kept it, intended to apply the early payments to discharge the earlier debits in the manner indicated in Clayton's case (*ante*), and accordingly that it must be taken as established that this was done. It follows that the bank, having had in fact notice of Mrs. Deeley's mortgage, cannot *primâ facie*, as against her, insist that the payments made after the date of that notice, December 2nd, 1895, should not in the first place be applied, so far as needed, to discharge the debit items anterior to that date—see Hopkinson *v.* Rolt (*ante*); London and County Bank *v.* Ratcliffe (6 App. Cas., 722; 51 L.J. Ch., 28); Union Bank of Scotland *v.* National Bank of Scotland (12 App. Cas., 53); and Bradford Banking Company *v.* Briggs (12 App. Cas., 29; 56 L.J. Ch., 364).

The practical result of the application to the facts of this case of the principles established by these two lines of authority, must, as counsel for the appellant has demonstrated on the figures, be taken to be that Mrs. Deeley's mortgage, in fact, gained priority on January 6th, 1896. The respondents contend, however, that the conduct of the Deeleys (I make, for the present, no distinction between the husband and wife) was such that it is inequitable on their part to rely upon this priority; that the truth on this matter must be shut out from the consideration of the House.

The conduct which it is contended, as I understand, precludes the Deeleys from relying upon the postponement of the bank's mortgage to their own in this connection is this: they were anxious, it is urged, that Glaze should get all possible accommodation from the bank; they must have known that the accommodation actually to him given would not have been given if the mortgage to the bank had lost its priority; they, accordingly, dealt on behalf of Glaze with the bank on the assumption that this mortgage retained its priority; and having so dealt with them they are estopped from asserting that the bank's mortgage has lost its priority. When that contention is analysed it merely comes to this—that there was a common mistake as to the true state of facts, due to Wilkinson's ignorance or forgetfulness of

fact and to Deeley's ignorance of a branch of the law which, as regards the bank, he was in no way bound to know. I concur with the Master of the Rolls in thinking that this course of dealing having taken place as it did, and under the circumstances in which it did, cannot estop the Deeleys from relying on the acquisition of priority by their mortgage.

I concur with the Master of the Rolls; I think his judgment was right and I am of opinion that this appeal should be allowed with costs here and below.

Lord Shaw: Mr. John Glaze was the owner of the Brockmoor Steel and Iron Works in the County of Stafford, and of certain messuages or dwelling-houses there. He carried on a steel and iron business and was in the position of requiring advances of capital. He was a customer of Lloyds Bank Limited, the respondents in this appeal. He executed three mortgages over his property. The first of these need not be referred to. The second was dated September 21st, 1893. By it it was stipulated "that the mortgagor hereby covenants with the company that he, the mortgagor, will, on demand, or if no demand is made in his lifetime, then his heirs, executors, or administrators, will, on his death, pay to the company the balance then owing from the mortgagor on his account current with the company for cheques, notes, or bills drawn, accepted, or endorsed by him, or for advances made to him or for his accommodation or benefit." The indenture contained other clauses usual in similar circumstances, and it was "provided always that the amount to be secured by these presents shall not exceed the sum of £2,500." It is an ordinary bank mortgage to secure to the extent of £2,500 a current account. About two years thereafter—namely, on December 2nd, 1895—Mr. Glaze granted a further mortgage over the same property in favour of the appellant. Notice thereof was duly given on behalf of the appellant to the Bank. The proceedings in this case have been protracted, and much of the delay and elaboration has been due to a denial by the bank that this notice was received. This defence has been held to be unfounded in fact, and it was not maintained at your Lordships' Bar. I incline to the view that the bank agent was of opinion—an opinion entirely justified by the value of the Brockmoor property while there was a going business therein—that the subsequent mortgage was a matter of no moment, looking to the enormous margin of security which still remained for the bank. In these circumstances I think it not unlikely that he took no special account at the time of the notice of the subsequent mortgage, and has forgotten all about it ever since. Mr. Glaze's circumstances, however, became more and more embarrassed. The bank, after the usual procedure, realized the property by private sale at a price just sufficient to cover the amount of its security together with a prior mortgage

which the bank had acquired. In these circumstances the bank maintains that no surplus is available for payment of anything to the appellant. The appellant, however, maintains that payments were made at times and of sufficient amount to extinguish the bank's security, and that consequently her mortgage ranks prior in date to that of the Bank, and the debt due thereon should be satisfied accordingly. It is agreed that if this be so the bank mortgage would be effective for any balance due from the property after satisfaction of the appellant's mortgage.

The position of the accounts may be stated in a word. The important date is December 2nd, 1895, being the date of the appellant's mortgage according to the bank pass books of Mr. John Glaze. There was at that date a debit balance of £3,379 on his current account. This to the extent of £2,500 was secured by the bank mortgage. When, however, notice was given of the execution in the appellant's favour by Mr. Glaze of the second mortgage on December 2nd, 1895, that notice was ignored. Mr. Glaze's account with the bank was continued as before. No fresh account was opened nor fresh security asked. Not even the course alluded to in argument of drawing a line across the bank account to distinguish fresh from former payments or advances was taken. Mr. John Glaze continued to pay in money to his credit, and within three weeks—namely, by December 21st, 1895—these payments more than extinguished the total amount of the £2,500 secured by the bank mortgage. In about another fortnight—namely, by January 7th, 1896—further payments were made by Mr. Glaze to the credit of his account which more than extinguished the entire balance due by him, secured and unsecured, to the bank on December 2nd previous.

The case is very similar indeed to that which was expressed many years ago in the compendious phraseology of Lord Chelmsford, which is quoted in the opinion of the Lord Chancellor (Lord Campbell) in Hopkinson *v.* Rolt (*ante*) :—"A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgage?"

There are *dicta* of the learned Judges in this case, and in particular of Lord Justice Fletcher Moulton, to which I shall afterwards refer, which make it appear almost necessary to recapitulate the general rules applicable to this subject. These general rules do not appear to have been left unsettled, but, in the view which I take of the judgment of Lord Justice Fletcher Moulton, and with the high respect which I have for that learned Judge, it humbly appears to me that these rules would be subjected to

considerable change if his judgment were affirmed by your Lordships' House.

Upon the topic of the rights arising between a bank which has obtained a first mortgage over the property of a customer and a second mortgagee who has obtained a second mortgage over the same property and has given notice thereof to the bank as first mortgagee, it may be necessary to state the law of the transaction from its commencement. I think that the rules, simply stated, are these :—

1. In the case of a grant of a mortgage to a bank by a customer in security of advances made and to be made, there, of course, still remains in the customer an estate capable of being disposed of by sale or affected by subsequent mortgage; and if a second mortgage is granted and notice given to the first mortgagee, it is contrary to good faith upon the part of the bank as first mortgagee to make in its own favour encroachments upon that remanent estate which would in effect enlarge the scope of the first mortgage and make it stand as cover for fresh advances. I have been anxious to place this proposition in the forefront of the case because it appears to me to be well founded in principle, to be amply warranted by authority, and to dispose of not a few of the arguments in reference to the equities as between the bank and its customers which have been freely used in the case. On the matter of authority I am humbly of opinion that the judgment of Lord Lindley (then Master of the Rolls) in West *v.* Williams ([1899] 1 Ch., 132; 68 L.J. Ch., 127) is of the highest value. That learned Lord says, summing up what in his opinion was the effect of Hopkinson *v.* Rolt (*ante*), Bradford Banking Company *v.* Briggs (*ante*), and Union Bank of Scotland *v.* National Bank of Scotland (*ante*) :—" These three cases show very clearly that the principle which underlies the rule established in Hopkinson *v.* Rolt (*ante*) is simply this, that an owner of property dealing honestly with it, cannot confer upon another a greater interest in that property than he himself has. The rule rests on no technicality of English law; it is based on the plainest good sense, and it is as much the law of Scotland as the law of England. When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself, subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it and create another mortgage subject only to the first. Nor can anyone who knows of the second mortgage obtain for the mortgagor a greater right to override it than the mortgagor himself has."

2. It is also contrary to good faith upon the part of the mortgagor himself, who has granted two successive mortgages, to do

anything which would facilitate the enlargement of the scope of the first mortgage to the detriment of the second, or would minimize the value of that remanent estate which as mortgagor he had assigned by the second mortgage subject to the first. This rule stands in the same position as the former in principle. It is covered also by the authority of Lord Lindley just referred to, and in the Union Bank case Lord Halsbury made it particularly clear. "The question is," said his Lordship, "whether Mrs. MacArthur," the mortgagor, "having bargained away and made an assignation of her reversionary right to the knowledge of the National Bank could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. My Lords, it seems to me that such a proceeding is contrary to good faith, and the decision of your Lordships' House in Hopkinson *v.* Rolt (*ante*) establishes the principle, and establishes it upon the broadest grounds of natural justice." Language to the same effect, and put in principle on the same basis, is used by Lord Justice Chitty in West *v.* Williams (*ante*).

3. This being the basis upon which the doctrine under discussion rests, the third general rule springs therefrom, and is applicable in the case of a bank holding a first mortgage in security of advances made and to be made on current account as follows: After notice to the bank of a second mortgage by the customer, the debit is struck at the date of notice, and in the ordinary case —that is to say, where an account is merely continued without alteration, or where no specific appropriation of fresh payments is made—such payments are credited to the earliest items on the debit side of the account, and continued so to be credited until the balance secured under the first mortgage is extinguished.

The judgment of Mr. Justice Eve in this case, although in my view it is erroneous in holding that the general rule was by the conduct of parties departed from, humbly appears to me to state that general rule, and also the effect of the series of authorities under which it has been canvassed, clearly and luminously, and I respectfully adopt that part of the learned Judge's judgment. After referring to Sherry's case (*ante*) he says:—"In giving judgment the Lord Chancellor (Lord Selborne) says this: 'The principle of Clayton's case (*ante*), and of other cases which deal with the same subject is this, that where a creditor having a right to appropriate moneys paid to him generally and not specifically appropriated by the person paying them, carries them into a particular account kept in his book, he *primâ facie* appropriates them to the account, and the effect of that is that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that

account.' I understand that to mean this : According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate, and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor has dealt with the payment, in order to ascertain how he did in fact appropriate it; and if there is nothing more than this, that there is a current account kept by the creditor, or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made, and having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation." This is substantially the view taken by the learned Master of the Rolls in his clear opinion in this case, and I respectfully agree with that opinion.

There are two passages, however, in the judgment of Lord Justice Fletcher Moulton which appear to me to deserve grave consideration. In that learned Judge's view, the law applicable to the ordinary case of a mortgage to a banker to secure a current account is this :—" When the bank receives notice of a second mortgage by the customer to a third person, it does not, in my opinion, affect the nature of the security; it remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice. But it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced, and once reduced, cannot again be raised." In a subsequent passage the same learned Judge says :—" In the simple case, therefore, of a secured account with subsequent payments in and payments out, I am of opinion that the presumed intention should be to apply the payments in to the unsecured items in order of date in priority to the secured items." I am humbly of opinion that these passages, which express a principle for and perhaps against which much could be said upon general grounds, are not and have not for many years been any part of the law of England or of Scotland. They appear to me to be in direct contradiction to authority, from Clayton's case (*ante*) downward to the judgments of Mr. Justice Eve and the Master of the Rolls in the present case. Lord Blackburn, in London and County Banking Company *v.* Ratcliffe (*ante*), commenting upon the series of decisions, and in particular on Hopkinson *v.* Rolt (*ante*), puts the matter thus :—" A mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to post-

pone advances made by a second mortgagee with notice of the first, to advances made by the first mortgagee after notice of the second mortgage." In short, I do not see my way to hold how the passages to which I have referred can stand alongside of the high authorities in the other direction.

4. Of course, upon the extinction of the first mortgage by the credit payments, the later mortgage, its predecessor being thus satisfied, attains priority, and, subject to the priority of the second mortgage, the mortgagor still remains answerable as debtor, and his property, or any remanent value thereof covered by the mortgage, remains the security to the bank.

Once these rules have been established, it seems late in the day to put forward considerations, such as appear in this case, as to either their inherent impropriety or their harshness in operation as against bankers. For, in the first place, the rules are, it may be affirmed, universally known and accepted in the banking world; and, secondly, the mode of protection open to bankers is as familiar and as simple as could be imagined. This case itself is an excellent illustration of the familiarity of the subject and of the mode in which a bank quite easily and naturally secures its own protection. The respondents in this appeal had a printed rule upon this subject. That rule was in the following terms :— "Wherever notice is received of a second mortgage or second charge on any security on which the bank holds a prior charge, the account must at once be ruled off and a separate account opened for subsequent transactions." Accordingly, in the present case, when the notice of the second mortgage, which it is now admitted was duly received, was given, the bank's procedure was laid down by the rules which it itself had set up. As I have already indicated, my view is that its agent, who swore in the witness-box that the notice had not been given, and who, I think, had not remembered the circumstance, treated the whole matter as of little consequence on account of what he considered the ample margin of security. As it was, what occurred was that the account was continued in the ordinary way, no change whatever being made in the direction either of stopping the existing account or of appropriating fresh payments, until after the time when, on the principle of Clayton's case (*ante*), the debt due to the bank had been extinguished. In the language of Lord Blackburn in Ratcliffe's case (*ante*) :—"The bank might, if they pleased, have taken the payments on such terms as to prevent the application of that rule [Clayton's case] but, not having done so, it seems to me that the old balance was, before the end of the year 1873, paid off."

This whole question of possible hardship upon bankers was discussed fully by Lord Chancellor Campbell fifty years ago in

Hopkinson *v.* Rolt (*ante*). "The hardship upon bankers," said the Lord Chancellor, "from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange), what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss." And in another passage he says :— "How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security."

In the present case what the bankers did was to ignore the notice of the second mortgage and to ignore their own rule, and, in fact, to make no specific appropriation whatever; and their dealings with the account were exactly the same as if there never had been a second mortgage or the rights of a second mortgagee. Speaking for myself, I cannot, in such circumstances, understand how the conduct spoken to in evidence can be held to amount to a recognition of a second mortgage, which throughout was maintained not to have been known. Nor does it seem possible to me that such conduct instituted or implied transactions so arranged as to avoid the incidence of the Clayton case (*ante*) principle, the bank's own rule for the latter being plain and having been ignored.

I am humbly of opinion that the judgment of the Courts below should be reversed.

Lord Macnaghten concurred.

Appeal allowed.

*Note.*—This case is cited at length because of its importance and further because the judgment of Moulton, L.J., in the Court of Appeal, fully set out, Legal Decisions, Vol. II, p. 231, was, in many ways, so subtly convincing and was so largely approved that it seems desirable to give equal publicity to the judgments which purport to refute its arguments and deductions, and, in any case, over-rule it. After admitting that while the rule in Clayton's case was good common sense where the items in an account were on an equality, Moulton, L.J., said it was not so otherwise, and proceeded as follows :—"Where

some are secured by virtue of their being antecedent to the second mortgage no sane man would dream of extinguishing them in preference to the subsequent unsecured ones, when it was a matter left to his choice. How then can we impute to him such an intention? What is the consequence of our so doing? If the bank are not aware of the pit dug by the law for them, they find their security gone. The second mortgage is put before the first mortgage because the law presumes in them an intention the very suggestion of which is ridiculous. If, however, they know of the pitfall, they go through the simple formality of drawing two horizontal lines in their books, and make believe to commence a new account and they are safe. I say 'make believe,' for it is not in truth a new account. That can only be started by arrangement with the customer."

This line of reasoning, coupled with his earlier declaration that the rule in Clayton's case was a mere presumption, liable to be rebutted by the inherent improbability of intentional appropriation to a secured in preference to an unsecured account, led Moulton, L.J., to decide in favour of the bank.

Buckley, L.J., admitted that the rule in Clayton's case was a rule of evidence, not a rule of law. He was of opinion that the way in which the account had been kept and communicated to the debtor by means of the pass-book would, in ordinary circumstances, have established the appropriation by the bank of the payments in to the secured account, but he held that the facts excluded the presumption of such appropriation and the application of the rule.

All this is, of course, now superseded by the judgment of the House of Lords.

The underlying idea of that judgment is the application of the principle in Hopkinson *v.* Rolt, that a mortgagee who receives notice of a second mortgage on the same property cannot encroach upon what have been termed the remanent assets of the mortgagor to his own advantage and the detriment of the second mortgagee. This holds good even if the mortgagee has agreed to make further advances; the mortgagor, by his own act, has prejudiced the security or precluded himself from giving the stipulated security for the stipulated advances, and so released the mortgagee from any obligation to make them. See West *v.* Williams, [1899] 1 Ch., 132.

This rule would be infringed if the bank could treat the security as covering further advances by attributing payments in to those advances and treating the liability at the date of notice of the second mortgage as undiminished. For such new advances, if made, the banker can only look to the surplus of the two mortgages.

It would be unreasonable, however, if the banker were disabled

from making further advances without imperilling the security for the amount outstanding at the date of notice.

And, as shown by this case, there is a perfectly easy and straightforward method by which to regularize the position, namely, by closing the old account and opening a fresh one for the new advances, the process ridiculed by Moulton, L.J., as a mere make believe. His criticism that you cannot really open a fresh account with a customer without his knowledge and consent is specious, possibly true; but the real effect of the ruling off is to rebut the presumption of appropriation of subsequent payments in to the old account; which is the material thing. It may be remembered that in dealing with this case in the Court of Appeal in Legal Decisions, Vol. II, p. 230, it was suggested that the precautionary measure was so easy that it might be advisable to retain it in use, and its validity is now completely established. Of course, if the customer specifically appropriates any payment in to the old account, it must be received and treated as such, or else refused.

On discharge or satisfaction of the mortgage subsequent to the bank's, things return to the *status quo ante*, and the prior mortgage is resuscitated as security for the total account.

It would seem advisable that the closing of the old account and the opening of the new one should be communicated to the customer by means of the pass-book or otherwise.

[IN THE KING'S BENCH DIVISION.]

## MORISON *v.* KEMP.

29 Times L.R. 70. Journal, Vol. XXXIV, p. 1.

*"Per Procuration" signature to a cheque.*

A MANAGING clerk had authority to sign cheques "per pro." the firm by whom he was employed for the purpose of the latter's business, and he used this authority to draw cheques in payment of his own betting debts. The action was by the employer against the bookmaker to whom the cheques were paid, and the latter was ordered to repay their amount on the ground that under sec. 25 of the Bills of Exchange Act a per procuration signature operated as notice that the agent had but a limited authority; his employers were insurance brokers, and it was obviously not part of their ordinary business to make bets, and the defendant bookmaker must therefore be taken to have been put upon inquiry.

*Note.*—This case, and that of Gompertz *v.* Cook, 20 Times L.R., 106, to the same effect, must be re-considered in the light of the later and higher authority of Morison *v.* London County and Westminster Bank, [1914] 3 K.B., 356, *post*, p. 91, where Phillimore, L.J., says at p. 382:—"The man who takes a negotiable instrument signed per pro. has notice that he may not get his money. It is a question of infirmity of title. But when once the instrument has been discharged by payment, neither the presenter nor his successors in title are put under any liability to repay because he or they had originally notice that they might not get their money." There is, however, much to be said in favour of the earlier reading of the section.

[IN THE KING'S BENCH DIVISION.]

## W. LADENBURG AND CO. *v.* GOODWIN, FERREIRA AND CO. (LIMITED) (IN LIQUIDATION) AND J. P. GARNETT (THE LIQUIDATOR).

Reported. [1912] 3 K.B. 275. 28 Times L.R. 541. Journal, Vol. XXXIV, p. 54.

*Letters of Hypothecation—Registration under the Companies Acts as a Charge on Book-debts.*

THE plaintiffs made advances to the defendant company on the company's drafts. The company gave the plaintiffs duplicate bills of lading, copies of invoices of goods shipped by them, and a letter "hypothecating the shipments or the proceeds thereof." The company sold goods to their customers, all charges from the warehouse being charged to the customers' account, and on six months' credit. The goods were shipped on bills of lading made out to the customers' orders. The company having gone into liquidation, the plaintiffs claimed to be entitled under the letter of hypothecation to the proceeds of a particular shipment of goods.

*Held*, that the letter of hypothecation gave a mortgage or charge not on the goods but on the proceeds thereof, and that such charge was on the book debts of the company within sec. 93 of the Companies (Consolidation) Act, 1908, and as it was not registered it was void against the liquidator of the company.

Mr. Justice Pickford, in the course of his judgment, said the case raised a new point. The transaction in question was one between bankers and a company to whom the bankers advanced money on goods or their proceeds. The original arrangement between the parties was contained in a letter of August 25th, 1904; and a later letter, dated March, 1911, dealt with the particular shipments now in question. Before, however, reading the letter of August 25th, 1904, he ought to read the earlier letter of August 22nd from the plaintiffs to the defendant company's chairman, which was in these terms: "With reference to the business discussed at our last interview, and in reply to your favour of the 19th inst., we beg to inform you that we shall be very pleased to accept the drafts of your firm, Messrs. Goodwin, Ferreira and Co., Manchester, to the extent of £5,000 against duplicate bills

of lading and invoices for shipment of merchandise to South America and letters of lien on these shipments signed by your agents or customers."

That letter was answered on August 23rd to this effect :—" Our chairman . . . has communicated to us the contents of your letter of yesterday's date, addressed to him privately, and we are pleased to learn that you are willing to entertain the business proposed to you by him when last in town. We note with thanks that you are prepared to grant us—to start with—a credit of £5,000 against indents shipped by us to South America. . . . The standing of our firm, our system of trading, and the manner in which our transactions have been conducted during the last twenty odd years do not admit of letters of lien being signed either by customers or agents; but, on the other hand, we are quite ready to hypothecate the shipments to your good selves as a security at the time of handing you copies of bill of lading and particulars of invoices, and, further, shall undertake to cover drafts honoured with your signature, a few days before maturity, under similar circumstances. We have no doubt that this arrangement will meet with your cordial approval. . . ."

On August 25th there came the operative letter addressed by the plaintiffs to the defendant company which was as follows :— " We beg to acknowledge receipt of your favour of the 23rd inst. and to inform you that we find the contents of the same to be quite in order, and as desired take pleasure in giving you this confirmation—viz., that we are prepared to grant you a credit for £5,000, valid against your drafts drawn on us accompanied by duplicate bills of lading and copies of invoices of goods shipped to South America, and (as suggested by your good selves) a letter hypothecating the shipments or the proceeds thereof to us. . . ." The intention of the letter, his Lordship thought, was that the defendants should give to the plaintiffs a mortgage or equitable security on the goods where they could or where it could be enforced, and where it could not be given on or enforced upon the goods, an hypothecation of the proceeds. There was no meaning in the words " or the proceeds thereof " unless that was the intention.

The letter dated March 16th, 1911, addressed to the plaintiffs dealing with this particular transaction was as follows :—" We have to acknowledge receipt of yours of yesterday and now beg to enclose you herewith our cheque for £10 5s. 3d., being 5s. 3d. interest on Manchester cheque and £10 in payment of accepting commission on draft L. 2,098 for £1,000 at six months' date, which we enclose for favour of your acceptance and return to us. Relating to same we also hand you copies of bills of lading and abstract of invoices amounting to £1,005 19s. 2d., which we hereby hypothecate to you or the proceeds thereof."

The circumstances of the different transactions, which were substantially the same, were these. The defendants sold the goods to their customers with all charges from the warehouse to the customers' account, and on six months' credit. The goods were consigned on bills of lading made out to the customers' orders; the customers had consequently the sole property in the goods subject only to a possible right on the part of the defendants to stop *in transitu*. In these circumstances it was difficult to see how any valid charge or mortgage on the goods could thus be given to the plaintiffs. The plaintiffs were, however, given an hypothecation upon the proceeds of the goods, the proceeds were the invoice value to be paid by the customer, and that seemed to be a book-debt owing by the customer to the defendants. Was a charge thus given upon the book-debts of the company?

For the plaintiffs it was said that it was not, because it did not bind the money while in the hands of the customer and did not give the plaintiffs any right to call upon the customer to pay the money to them. It was said that when the money got into the hands of the defendant company or into the hands of the liquidator, it was impressed with a trust in favour of the plaintiffs. His Lordship could not see how it was impressed with a trust unless there was a charge previously existing. It seemed to him that there was a charge upon the money which, until it was paid to the defendants, was a book-debt, and it was because it was a book-debt that, when received, it was impressed with a trust, if it ever became so impressed.

In these circumstances, was the charge within sec. 93 of the Companies (Consolidation) Act, 1908? That section provided *inter alia* that every mortgage or charge created after July 1st, 1908, by a company and being a mortgage or charge on any book-debts of the company should, so far as any security on the company's property or undertaking was thereby conferred, be void against the liquidator unless the mortgage or charge was registered. This charge came within that section, and as it was not registered it was void against the liquidator. There would therefore be judgment for the defendants.

*Note.*—It is not easy to see what security is conferred by a duplicate, viz. copy bill of lading, the originals being to the order of and in the hands of other persons, who acquired the sole property in the goods. *Cf.* Shepherd *v.* Harrison, L.R., 5, H. of L., 116. Having parted with the entire property the shippers were not in a position to give any charge on the goods, that failing, the letter of August 25th could only take effect on the unpaid purchase money; that was a book-debt and so the Act applied.

[IN THE COURT OF APPEAL.]

## LLOYDS BANK LIMITED *v.* SWISS BANKVEREIN; UNION OF LONDON AND SMITHS BANK, LIMITED *v.* SAME.

29 Times L.R. 219. Journal, Vol. XXXIV, p. 207.

*Bankers and Bill-Brokers—Title to Securities.*

This was an appeal from the judgment of Mr. Justice Hamilton, giving judgment for the defendants. Journal, Vol. XXXIII, p. 447. The claim was for the return of about £35,000 worth of fully negotiable securities or their value, and raised points of great importance as to the legal relations of bankers and bill-brokers in ordinary bill-broking transactions. The case is specially noteworthy for the startling doctrine propounded by the plaintiffs of trusts affecting fully negotiable securities.

The facts as summarised by Hamilton, J., and adopted by the Court of Appeal were as follows:—

On September 15th, 1911, there fell due for payment by Edward Hellings and Co., a firm of bill-brokers in the City of London, to the plaintiff banks two large sums of short money lent against securities; and on the morning of that day Hellings gave to the two banks cheques for the amounts due—cheques which were subsequently dishonoured—and received back from the banks the securities which had been deposited to secure the loans when they were first made. Later in the same day, the defendant bank received from Hellings on two separate occasions, but on each occasion with the assent of Hellings, certain of these securities which that firm had received in the morning from the plaintiffs—namely, at 2 o'clock securities of the nominal value of £22,000, or thereabouts, and at 3 p.m. securities of the nominal value of about £15,000. The whole of the documents in question in the action were negotiable instruments, and most of them were Indian railway bearer bonds, guaranteed by the Secretary of State for India. The question was, Were the plaintiffs or the defendants entitled to those securities?

There could be no real doubt but that on September 15th, 1911, Hellings had been insolvent for some time, and that the senior partner with whom the case was concerned was tolerably well aware of the fact.

On the morning of September 15th, the plaintiff banks' loans had to be repaid. What was usually done was for the borrower in such a case to deliver his cheque to the lender, take away the securities that had been deposited, and deal with them in the course of the day. Hellings did this on that occasion—that was to say, he took away securities from the two banks in exchange for two cheques. Somewhere about the middle of the day, somehow, someone gave the signal, and Hellings's business came to the ground. Various people who had lent money on call to Hellings wanted it back, and thereupon Hellings, senior, thought it was time to consult his solicitor, and it was understood that as the result of that interview he was told that if the margins held by him—which had been obtained from the defendants on the entirely false statement by Hellings that they were required to be deposited with the National Telephone Company, from whom money was to have been borrowed on the joint account—were asked for they were to be given up.

His Lordship could well believe that Hellings, senior, had the idea that if these margins were asked for and were not given up some one might say he was dishonest, and that even if the margins were found in his possession aspersions might be thrown upon his character. Accordingly, Hellings saw Mr. Rueff, of the defendant bank, and the result was that another official of the bank, Mr. Glencross, went to Hellings's office to get back these margins. Mr. Glencross thereupon went to Hellings's office about 2 o'clock, and was given securities of the value of £20,200.

The defendants had other money out with Hellings. That same morning they had called a short loan for £15,000, and had given out securities to Hellings against their cheque. In point of fact, exactly the same procedure had been gone through with them as had been gone through about the same time with the plaintiff banks. Mr. Glencross was told to go again to Hellings's office and get back those securities, taking back Hellings's cheque for £15,000.

Hellings, who appeared to be desirous to make restitution in the matter of the margins, boggled at the idea of returning £15,000 additional securities, which were not margins, but in the end securities of that amount were given up to the defendants' official. The plaintiffs said all these securities were theirs —theirs in the sense that they were still holders of them for value, as they had been in the morning of that day.

The plaintiffs said there was a practice of bankers which either had the effect of a custom, or to which the law attached the significance of a trust, under which Hellings, being still in possession of the securities, and his cheques not having been met, held the securities as custodians for the plaintiffs, no doubt with an authority to negotiate them for value, which authority, however, had not been exercised. As against a *bonâ-fide* holder

for value, the plaintiffs conceded that their rights must go, but they said the practice they set up was universal, and its meaning notorious to the defendants, who had themselves acted upon it that day, and must, therefore, have had knowledge of the infirmity of Hellings's title to the securities.

The question therefore arose, upon the assumption that the practice relied upon by the plaintiffs might be proved: Did the defendants take the securities in question for value and without notice? As to the margins taken back by the defendants at 2 o'clock, his Lordship thought the defendants were holders for value, but the case was otherwise with regard to the £15,000 securities obtained by the defendants at 3 o'clock. As regards both bundles of securities he was further of opinion that the defendants took with notice, not, indeed, that they had actual knowledge of any infirmity in Hellings's title, but they had such notice as would put them on inquiry, and would have led to actual knowledge. He did not, however, wish to be understood to be reflecting upon the defendants' conduct in any way; they were endeavouring to get possession of security, a thing not improper in itself, in circumstances which would make them take the risk of litigation afterwards if their action were impugned.

The learned judge then dealt with the question whether the securities were impressed with a trust in the hands of the broker so that there was a right to follow the fruits of the trust property. He came to the conclusion that that was not the necessary or natural conclusion to put upon the transaction, emphasizing the point that it was not a light matter to burden negotiable instruments with a trust. He also commented on the cheque being a negotiable security, and conditional payment, the giving of which, if plaintiffs' theory prevailed, was entirely otiose. He held that apart from any question of holder for value without notice, as soon as the plaintiffs parted with the securities they ceased to be able to make any claim to them in this action and gave judgment for the defendants.

The plaintiffs appealed. The Court of Appeal dismissed the appeal.

In giving judgment the Lord Chief Justice said that he had read the judgment prepared by Lord Justice Farwell, and concurred therein. With regard to the case of Burra *v.* Ricardo (1 Cab. and Ellis, 478), he had no doubt, as far as the actual judgment was concerned, that it proceeded on the fact that the securities had got back into the possession of the original lender before any question arose. But he desired to say that, unless there was something in the Stock Exchange rules when that case was decided which would impose a stereotyped duty, he did not agree with the judgment of Mr. Justice Mathew.

Lord Justice Farwell in a written judgment said that the short question on this appeal was whether in short money dealings the delivery of negotiable instruments by a banker to a bill-broker in exchange for his cheque was a delivery out-and-out or was a delivery upon trust. It was not and could not be contended that the delivery was to the bill-broker as a mere fiduciary agent for the bank to deal with negotiable securities for or on behalf of the bank; it was clear that the securities were delivered to the broker as his property, to be used by him in his own business or otherwise for his own purposes as he thought fit. But it was said by the appellants that the securities were impressed with a trust binding the bill-broker and all persons claiming through him, other than purchasers for value without notice, to restore the securities to the bank at or before closing hours on the day of their delivery, unless the broker's cheque had been otherwise provided for. It was not suggested that such a trust had ever been expressed in words or heard of as such, but it was said that its existence was so essential to the business efficacy of the transaction that the Court must infer it.

The question arose out of short money dealings of somewhat recent origin. There were now large quantities of first-class negotiable securities created for so short a period of existence as not to be quoted on the Stock Exchange, which were peculiarly appropriate for use in raising loans for a very short time—and money was now raised for a few hours as well as for a few days only to a very large extent. He would take one case only —night money—because it was the shortest period and the one taken by counsel for the plaintiffs as most favourable for his argument. The course of dealing was this. The Bank of England issued and offered for sale a million (say) of debentures to bearer of an Indian railway company, guaranteed by the Secretary of State for India, and a bill-broker desired to take up, say, £50,000 of this issue. The bank would not issue them on credit or on a cheque, but required a banker's draft or cash.

The bill-broker had neither cash nor a balance to his credit at any bank of more than a few hundreds, but he was known as a man of good standing and honour. He obtained, on the strength of the credit of his character, from some bank the necessary draft, which he took to the Bank of England, and obtained from them the securities that he desired to buy, and then took them on to his own bank and left them until the next morning. He then came, on the opening of his bank, and obtained the securities in exchange for his own cheque on that bank for a sum equal to that paid to the Bank of England on the previous day. It was known to both parties that his balance was quite insufficient to meet the cheque then, but the arrangement was that he had until 4 p.m. to pay in cash to meet it. He was at liberty to deal with the

securities as owner as he thought fit. It was admitted that he might sell or exchange or charge them, not only for business purposes, but to pay his own private debts, but it was said that if he had not met his cheque by 4 p.m. and the securities were in his hands or in the hands of anyone other than a purchaser for value without notice, these negotiable instruments were impressed with a trust in favour of the bankers.

The bank's claim was first put on custom, but this was abandoned. There was no evidence either of a general custom which had now become part of the law merchant and therefore of the common law, or of any custom of a particular trade; but it was said that all the banks who dealt with bill-brokers relied on them, as all bill-brokers knew, to return the securities or equivalent if their cheques were not met by 4 p.m. In his opinion, the evidence, to be of any use to the plaintiffs, must establish a custom of the trade. If there were such a custom all persons in the trade knew of it and contracted with reference to it. But if it were only the present ordinary practice of a number of individual firms this established nothing but the practice of each firm and had no bearing on the question whether contracting parties in any particular contract had or had not adopted the same practice. It was either a custom of the trade or nothing. These securities were negotiable and passed by delivery, and it appeared to him impossible to imply such a trust, and still more to affect any honest taker (and there was no question of dishonesty here) of such a document with constructive notice of some implied trust.

It had been held in this Court that the equitable doctrine of constructive notice had no application to commercial transactions. In the Manchester Trust *v.* Furness ([1895] 2 Q.B., at p. 545) Lord Justice Lindley said, "What is wanted in this case is to say that by reason of the reference to the charterparty the holder of the bill of lading and the person who takes it in the ordinary course of business are to be treated as having notice of all the contents of the charterparty. There is no doctrine that goes to anything like that extent; and as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive

notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country."

That was the case of a charterparty containing an unusual clause, and it was contended that the holder of the bill of lading, who, of course, knew of the charterparty, had constructive notice of all its contents. In Curtice *v.* the London City and Midland Bank ([1908] 1 K.B., 293), the same result was arrived at in the case of countermanding a cheque. It would be a far stronger thing to imply the existence and notice of a trust affecting negotiable instruments. If Mr. Justice Mathew, in Burra *v.* Ricardo (*supra*) meant to find that there was a custom of the Stock Exchange, then that decision had nothing to do with this case; but if he did not, he was unable to agree with his decision, which involved the creation of a novel equity and the application of the doctrine of constructive notice to Stock Exchange dealings. But in his opinion the appellants entirely failed to prove the existence of any trust at all.

The transaction was a plain sale or a release of securities, and payment by cheque was accepted in discharge. There was an implied contract that payment of the cheque was not to be demanded before 4 p.m., and that it would then be met by providing cash during the day, but there was no contract as to the manner in which such cash was to be provided; it might be in any way that the broker thought fit, including borrowing the money to meet it from the bank itself, on the security of other securities or of the actual securities delivered to the broker in the morning, if still in his possession.

The whole dealing in short money by bankers and bill-brokers rested on credit. It had its inception in credit and arose out of the refusal of the Bank of England to give credit without security. The credit was short, and the banks only gave it to men whom they knew and believed that they could trust. The evidence was to his mind clear, and showed that this was an ordinary business transaction on credit; the bankers gave up their securities and took the broker's cheque, and the risk was theirs on the broker's cheque. The appellants' argument really was founded on a play upon words. They said, "The banker trusted the broker with the securities without getting the money for them; therefore the securities are impressed with a trust." One might as well say that a wholesale dealer who trusted the retail dealer with goods on a month's credit trusted the latter with the goods, and that such goods were therefore impressed with a trust.

To trust a man with goods by delivering them on credit was not to create a trust affecting the goods so delivered. The appellants' contention in fact, although not in terms, set up a vendor's lien on negotiable securities; a Common Law lien was out of the question, and equity, therefore, was vouched. A vendor's lien

was treated in the books as either an equity independent of contract or as a tacit agreement enforceable only in equity; and the argument of the appellants here was that on which a vendor's lien on real estate was founded—namely, that a person who had gotten the estate of another ought not in conscience as between them to be allowed to keep it and not to pay the full consideration; and a third person who had notice (express or constructive) could not keep the estate without paying the price, for it attached to him also as a matter of conscience and duty—Mackrell *v.* Symmons (15 Vesey, 340).

The application of this equity had hitherto been confined to real estate, and they were now asked to apply it to negotiable instruments used in mercantile and financial transactions in the City of London. So to apply it would be (to use Sir George Jessel's phrase) "Equity gone mad." The very idea of impressing negotiable instruments with a vendor's lien or implied trust was utterly repugnant to their nature.

Mr. Justice Hamilton at pages 306 and 307 of the report of this case in Commercial Cases says this:—"I am loth to hold that a negotiable instrument, which is already attended with perils enough, is impressed with a trust of this kind unless it is necessary, and I cannot see the necessity. I am quite clear that in a small market, if this practice were established, where everybody must know the practice and everybody must appreciate that everybody else is acting on the practice, the risk of someone else being affected, I might almost say infected, with notice of the infirmity of the borrower's title would be most seriously increased, because although he is safe enough as long as he merely takes the security and asks no questions, a very small amount of information tending to show that the borrower—the bill-broker—was not going to pay in a new loan to meet the old cheque would be notice that he was dealing with the security in contravention of his trust, and would, therefore, affect the second lender with a risk of notice although the actual dealings with the instrument might be entirely regular." The Lord Justice entirely agreed.

So far from the Moorcock case (14 P.D., 64) being an authority in the appellants' favour, if it was an authority at all, it was against them, for nothing could be more inconsistent with the business efficacy of mercantile and financial dealings in the City than the application thereto of equitable doctrines of implied trust and constructive notice, admirable although such doctrines might be when applied to real estate and the deliberate dealings therewith in conveyancers' chambers.

It was therefore unnecessary to consider the details of the manner in which the Swiss Bank became possessed of these negotiable securities. They got them honestly, and that was enough.

Nor was it necessary to consider the details of Mr. Justice Hamilton's judgment as to " purchaser for value " and " notice." He expressed no opinion thereon, and must not be taken to assent or dissent. Both appeals failed and should be dismissed with costs.

The President said he had read the judgment and concurred in it.

Appeal dismissed.

*Note.*—This case is particularly valuable as disposing of three fallacies or heresies.

1. The contention that a negotiable instrument such as a bearer bond can be clogged with a trust.

As Farwell, L.J., says, " The very idea of impressing negotiable instruments with a vendor's lien or implied trust is utterly repugnant to their nature."

The negation of this doctrine does not, of course, affect the principle that when the negotiable instrument has been obtained by fraud from, or is parted with in fraud of, the true owner, no one but a holder for value without notice can make a good title thereto. Fraud was not alleged against the brokers; at most, breach of contract. The judge in the Court below held that the defendants gave value for one parcel of the securities, but not for the other; with regard to both he held that the defendants had notice, not actual knowledge of any infirmity in the broker's title, but such notice as would put them on inquiry, and would have led to actual knowledge. But, both in his view and that of the Court of Appeal, this was immaterial; there was no trust and the defendants took the securities honestly, and were entitled to keep them.

2. The contention that though no such trust had ever been expressed in words or heard of as such, its existence was so essential to the business efficacy of the transaction that the Court must infer it.

This is a form of the often invoked, now discouraged, theory of the Moorcock case, to which the Court of Appeal refer with the words " If it is an authority at all."

As here, that case has been frequently adduced as justifying the introduction into a contractual relation of incidents not embodied therein or annexed thereto by any recognised legal principle, on the plea that without such incidents the contract is of no commercial efficacy and that the parties must have had such incidents in their contemplation. The usual judicial answer nowadays is that it is not the function of the Court to make a contract for the parties or import terms which the parties themselves could have embodied had they wanted to.

3. The attempted extension of the equitable doctrine of constructive notice to dealings with negotiable instruments.

Quoting Lindley, L.J., Farwell, L.J., says, "As regards the extension of the equitable doctrine of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. . . . If we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country."

In the highest possible degree this is true with regard to negotiable instruments. What, with regard to bills, notes, and cheques, constitutes notice debarring the taker from the position of a holder in due course has been amply and finally defined by the Bills of Exchange Act and judgments of the House of Lords. It would be fatal to countenance any variation of or tampering with the tests thereby established and universally recognised.

[IN THE HOUSE OF LORDS.]

## ATTENBOROUGH *v.* SOLOMON.

Reported. [1913] A.C. 76. Journal, Vol. XXXIV, p. 232.

*Pledge by one of two Executor-Trustees.*

THE facts were these: a testator by his will appointed two persons as executors and trustees, and gave his residuary estate to his trustees upon trust for sale and distribution. Fourteen years after his death one of these executor-trustees, without the knowledge of his colleague, pledged certain property forming part of the estate and misapplied the money, the lender having no knowledge that he was not the absolute owner. The point for decision was whether the pledged property was vested in the executors of the deceased, in which case a single executor had power by virtue of his office to pledge the property, or whether it was vested in the same persons as trustees, in which case the pledge was invalid.

It was held that on the facts of the case the executors had, by the date of the pledge, assented to the trust disposition taking place, and held the property not as executors but as trustees.

*Note.*—Bankers should and do insist on all the trustees co-operating in any transaction involving the trust property. Trustees are not in law one personality, and delegation is not within the functions of a body of trustees, Flower *v.* Metropolitan Board of Works, 27 C.D., 592. This includes the drawing of cheques, Questions on Banking Practice, 7th ed. Qn. 1274. Where the trust deed specially provides for the drawing and signing of cheques by specified members or a certain proportion of the body of trustees, this does not involve delegation, it is direct authority, and cheques drawn in accordance therewith would be in order.

[IN THE KING'S BENCH DIVISION.]

## WALKER AND ANOTHER *v.* MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY (LIMITED).

29 Times L.R. 492. Journal, Vol. XXXIV, p. 413.

*Customer's duty to examine his Pass-book.*

In this case the plaintiffs claimed £600 as money lent by the plaintiffs to the defendants as bankers for the plaintiffs, and money had and received by the defendants to the use of the plaintiffs.

The plaintiffs, Mr. Walker and Mr. Stirling, were solicitors, although not in partnership, who were trustees under a marriage settlement. They were so appointed in 1898, and they opened an account with the defendants, instructing them to honour cheques drawn by Mr. Walker or Mr. Stirling. In 1899 a clerk named Higgins entered Mr. Walker's employment as costs clerk. Higgins came with the highest references, he was completely trusted by Mr. Walker, and was eventually made cashier, and it was his duty to look after the trust account in question. In 1907 the particular trust estate was practically wound up, only a few small properties being then undisposed of because they were at the time not saleable. A little came in from these properties, which was paid into the bank from time to time, and distributions were made to the beneficiaries. A few hundreds were kept in the account. In November and December, 1912, Higgins was ill and absent from the office, and during his absence Mr. Walker had occasion to look into the account, which he then discovered had not been made up for some considerable time. Inquiries were made, and eventually Higgins, in a letter written to Mr. Walker, confessed that he had forged the three cheques which were drawn on this trust account and which were the subject of this action. That letter was at once shown to the bank manager. The three cheques, which had not been found since they were paid, and which no doubt had been destroyed by Higgins when the paid cheques were returned by the bank, were as follows:—The first was for £250, which was debited against the account on March 30th, 1910; the second was for £250, which was debited to the account on August 14th, 1911; and the third was for £100, and was debited to the account on

August 14th, 1912. These debits were wholly unauthorised. The defendants set up in defence that Higgins's signature had been ratified by Mr. Walker; secondly, that there was an account stated between the bank and Mr. Walker based upon the fact of the pass-book passing backwards and forwards between Mr. Walker and the bank; thirdly, that there was negligence on the part of Mr. Walker in not properly keeping the particular trust account and in not examining the pass-books and returned cheques, and that such negligence caused the defendants to honour the cheques. As to these defences counsel for the plaintiffs contended that there was no duty on the customer of a bank such as suggested by the defendants. He cited the decision of Mr. Justice Bray in Kepitigalla Rubber Estates (Limited) *v.* National Bank of India (25 Times L.R., 402; 1909, 2 K.B., 1,010). Further, there had been no ratification of the acts of Higgins.

Evidence was then given by Mr. Walker. He said he was not in London when the three cheques in question were drawn, and that between March, 1910, and December, 1912, he did not see the pass-book. Higgins brought statements to him from time to time which seemed in order.

Cross-examined, the witness said that if he had examined the pass-book carefully he would no doubt have observed that the first cheque for £250 was a forgery, and probably the other cheques would not then have been drawn. Higgins had authority to endorse cheques to be paid into the bank.

Mr. Stirling, Mr. Walker's co-trustee, gave evidence that he had never taken any active part in the management of the trust.

Evidence was given by the defendants that the pass-book for the particular account was returned by the bank in 1910 to Mr. Walker on March 31st, July 5th, and November 3rd; in 1911 it was returned on May 16th, July 3rd, and August 14th; and in 1912 it was returned on January 2nd, June 5th, and August 16th.

This concluded the evidence.

Counsel for the defendants said he could not disguise from himself that, so far as this Court was concerned, there was a body of authority which he frankly confessed he had great difficulty in distinguishing. But, in view of the possibility of the case going further, he desired to make certain submissions. He pointed out that the pass-book, made up, was returned periodically with the paid cheques without objection being taken to it. There was thus a stated account between the parties, and it was none the less so because Mr. Walker deputed the whole conduct of this department of his business to Higgins. Further,

a customer was under a duty to examine his pass-book, and if there was such a duty it was broken by Mr. Walker. In Bank of England *v.* Vagliano (7 Times L.R., 333, at page 336: [1891] A.C., 107, at page 116) Lord Halsbury said that a customer was bound to know the contents of his pass-book. The pass-book was not kept simply to enable the customer to see what his balance was and to show him to what extent he could draw, and if the pass-book had been examined by Mr. Walker at the time of the first of the three cheques being drawn no further cheques of a fraudulent character would have been drawn. The negligence of Mr. Walker in not examining the pass-book was the effective cause of the loss, at all events in respect of the second and third cheques. Counsel contended that Mr. Justice Bray was wrong in Kepitigalla Rubber Estates (Limited) *v.* National Bank of India (*ante*) when he held that there was no such duty on the part of the customer to examine his pass-book. He also referred to Clayton's Case (1 Mer., at page 535), Marsh *v.* Keating (2 Cl. and Fin., 250), and Jacobs *v.* Morris (18 Times L.R., at page 386; [1902] 1 Ch., at pages 830, 831).

Counsel for the plaintiffs was not called upon to reply.

Mr. Justice Channell, in giving judgment, said that in his opinion this case was to all intents and purposes identical with Kepitigalla Rubber Estates (Limited) *v.* National Bank of India (*ante*) which he would follow, and he would only refer shortly to the particular points put forward by counsel for the defendants. The authorities were rather against the contention that there was a duty on the part of the customer to examine his pass-book, but the point was not very important, for even if there was a duty the particular loss by honouring the first cheque was not caused by the non-performance of the duty. As regards the second and third cheques, it was true that if Mr. Walker had found out about the first cheque he would have got rid of the fraudulent clerk, and the second and third forgeries would not have been committed. But the fact that Mr. Walker did not do so was not in law the cause of the second and third cheques being forged. At the most it was the *causa sine quâ non*, but that would not do. It was therefore unnecessary in this case to consider whether in no case was there a duty on the part of the customer to examine his pass-book, because, even assuming there was such a duty, the breach of it could not be said to be the effective cause of the loss.

Counsel for the defendants had also contended that the fact that Higgins was not a mere clerk, but was in the nature of manager of a department of the particular business, made a difference. The various authorities did not, however, proceed upon the ground of agency, and they showed that even if

Mr. Walker had himself gone to the bank, got his pass-book and examined it carelessly so that he did not discover the fraud, still he would not have been bound by the payments made by the bank. If that was so, it was immaterial that Higgins had a larger authority than some of the clerks in the other cases had. The substance of his judgment was that the case was governed by the previous cases. There would be judgment for the plaintiffs for £600, with costs.

*Note.*—The only progress to be recorded in the recognition, in this country, of any efficacy in the pass-book is the somewhat indirect effect accorded to it in Morison *v.* London County & Westminster Bank, [1914] 3 K.B. 356, *post*, p. 91, where total disregard of the warning it would have conveyed was treated as neutralising what would otherwise have constituted negligence on the part of the collecting banker. The bank in that case was not the plaintiff's own banker, so no duty existed, but the Court held that the banker, as a reasonable man, might assume that the plaintiff would acquaint himself with the contents of his pass-book, in which case he must have got to know of the frauds, and that not having, during the considerable period over which those frauds extended, received any complaint or notification from the plaintiff, the collecting bank were justified in assuming that everything was in order and continuing to deal with the fraudulent subordinate as theretofore.

The American Courts have again vindicated the full status and effect of the pass-book. In Morgan *v.* United States Mortgage and Trust, [1913] 208, New York Reports, 218, the New York Court of Appeals, consisting of six judges, review and approve the earlier authorities and re-formulate the position in the fullest and most satisfactory terms.

[IN THE KING'S BENCH DIVISION.]

## ROBINSON *v.* BENKEL.

29 Times L.R. 475. Journal, Vol. XXXIV, p. 416.

*Stamp Duty on Post-dated Cheques.*

This was a claim to recover £50, the amount of two cheques drawn to self or order and endorsed by the defendant. The plaintiff carried on business as a stockbroker in the City of London under the style of Stewart and Whitmore.

The case raised a short point as to the stamping of post-dated cheques.

The defendant put in two defences—that the cheques were originally given for gaming and wagering transactions, and so the burden of showing that he was a holder in due course was on the plaintiff; and that as the cheques were post-dated they were not payable on demand, and so ought to have been stamped in full as a bill of exchange, and not being so stamped were worthless.

Mr. Justice Horridge said that as to the defence that the cheques, being post-dated, were insufficiently stamped, the Royal Bank of Scotland *v.* Tottenham ([1894] 2 Q.B., 715) laid down that a post-dated cheque was a cheque payable on demand when the due date arrived, and he held that these cheques were sufficiently stamped and were cheques and not bills of exchange in that sense.

*Note.*—Any objection to a post-dated cheque, either on the ground of its being post-dated or with regard to the stamp is absolutely hopeless, in face of the Act and the decisions.

[IN THE CHANCERY DIVISION.]

## GRIERSON *v.* NATIONAL PROVINCIAL BANK OF ENGLAND (LIMITED).

Reported. [1913] 2 Ch. 18. Journal, Vol. XXXIV, p. 417.

*Mortgage—Equitable charge by deposit—Subsequent legal mortgage to another incumbrancer—No notice to first mortgagee—First mortgagee paid off—Title deeds again pledged to secure banking account—Priority.*

THE owner of leasehold premises charged them with the payment of certain moneys to the G. and M. Bank and deposited the lease as security. He then mortgaged the premises by sub-demise expressly subject to the bank's charge, and declared himself a trustee for the mortgagee of the nominal reversion. The legal mortgagee did not give the bank notice of his mortgage. The mortgagor subsequently, without the knowledge of the legal mortgagee, paid off the G. and M. Bank, obtained the lease from them and afterwards deposited it with the defendant bank, who had no knowledge of the legal mortgage, to secure moneys due to them. The executors of the legal mortgagee commenced this action to establish their priority over the defendant bank, who alleged that the legal mortgagee had himself paid off the G. and M. Bank, and was guilty of negligence in not obtaining the deeds, and in not giving notice of their mortgage to the G. and M. Bank. The result of the evidence at the trial showed that the mortgagor had paid off the G. and M. Bank out of his own moneys without the knowledge of the legal mortgagee.

Mr. Justice Joyce said that there was not any misconduct or negligence or want of caution for which the legal mortgagee could be held directly or indirectly responsible. It was well settled that, however expedient it may be for a second mortgagee to give notice of his security to any prior mortgagee of whom he has notice, he nevertheless is not bound to do so, and in a case like the present his position would not be prejudiced by the omission. The owner of an equity of redemption who pays off a charge which he is personally liable to pay is not allowed to set up the charge against a subsequent incumbrancer to whom he is liable. Nothing had happened to take away or affect the

original priority of the legal mortgagee, although his security had been improved by the payment made by the mortgagor to the C. and M. Bank. He still retained his priority, and there must be an appropriate declaration to that effect.

*Note.*—In order to postpone a prior legal mortgagee to an equitable one, there must be on the part of the legal mortgagee such carelessness as amounts to neglect of the precautions an ordinary reasonable man would take and indicates indifference to obvious risks, *cf.* Hudston *v.* Viney, [1921] 1 Ch., 98, 104, *post*, p. 229. A second mortgagee should in practice give notice to the prior one where possible.

[IN THE COURT OF SESSION.]

## WOOD *v.* CLYDESDALE BANK.

Journal, Vol. XXXIV, p. 441.

*Stolen deposit receipts.*

THE facts of the case were that Wood, a depositor in the defendant bank, sent to his brother a registered letter containing an endorsed deposit receipt for £100 and a letter addressed to the bank asking them to pay £60 to his brother. A similar letter was posted direct to the bank. The deposit receipt was stolen and presented by a person who represented himself to be the depositor's brother. At the request of the bank he endorsed the receipt and the money was thereupon paid to him.

The depositor sued the Bank for the money and judgment was given for its payment to him.

*Note.*—The cases as to how far the depositor, by dealing with the deposit receipt, can give a third party a direct claim against the bank are difficult to reconcile. Probably the true view is that the debt represented by the deposit receipt is itself assignable, and that the deposit receipt may be utilised as the instrument or evidence of an equitable assignment.

As in the above case and in Evans *v.* National Provincial Bank, 13 Times L.R., 429, payment on a deposit receipt to a person having no title to it or the money it represents cannot discharge the bank.

[IN THE KING'S BENCH DIVISION.]

## THE NATIONAL PROVINCIAL BANK OF ENGLAND (LIMITED) *v.* GLANUSK.

Reported. [1913] 3 K.B. 335. 29 Times L.R. 593. Journal, Vol. XXXIV, p. 477.

*Action on a Guarantee.*

THIS action was brought against Lord Glanusk by the National Provincial Bank of England (Limited), claiming £3,022 1s. 2d., a balance alleged to be due under a guarantee of an overdraft given by the defendant.

In 1906, when the defendant succeeded to the title and to estates in Radnor, Breconshire, and Liverpool, Mr. Samuel H. Cowper Coles, the defendant's brother-in-law, was confirmed in the position of agent. It was suggested that an overdraft was necessary at the Crickhowel branch of the plaintiffs' bank until the income from the estates began to come in at the end of the half-year, and the defendant accordingly guaranteed an overdraft to the extent of £5,000. The accounts at the bank stood in the name of Mr. Coles. It was alleged by the defendant that it was arranged that this guarantee should be confined to an account known as the estates account, and he asked for a rectification of the written guarantee limiting it to that account, on the ground that there had been a mutual mistake in reducing the arrangement to writing whereby it had been made to appear as a general guarantee of Mr. Cole's liabilities. He also submitted that the bank knew, and should have informed him, in 1907, that the overdraft was being used by Mr. Coles for purposes not contemplated by the guarantor.

After hearing the evidence, Mr. Justice Horridge, in giving judgment, said that it was not disputed that the guarantee of March 1st, 1906, was, on the face of it, for all moneys which might be due to the plaintiffs on all accounts whatever from Mr. Coles. As to whether there was an antecedent agreement limiting it to one account, there was a conflict of evidence between Mr. Coles and Mr. Powell, the bank manager. He accepted the evidence of Mr. Powell that the agreement was that the guarantee should be in respect of the whole of Mr. Coles's liabilities.

As to the second contention, that certain transactions in March,

1907, ought to have been communicated to the defendant by the plaintiffs, it appeared that the plaintiffs' manager had been informed that the defendant knew of the cheque then drawn, and his Lordship did not think that there was anything which ought to have conveyed to the manager's mind that Mr. Coles was acting dishonestly towards the defendant, and on the authorities cited there did not appear to be any duty on the plaintiffs to indicate to the defendant the fact (if it was a fact) that there was a suspicion that Mr. Coles was acting wrongfully, nor did he think that there was any satisfactory proof that they were so suspicious. He gave judgment for the plaintiffs for the amount claimed, with interest, a total of £3,348 9s., with costs.

*Note.*—The contract of guarantee is not one *uberrimae fidei*, requiring full disclosure of all material facts. The banker is not bound to volunteer to a proposing guarantor information as to the customer's financial position or business habits, though such information, if given, would probably decide him not to sign any guarantee, Hamilton *v.* Watson, 12 Cl. and F., 109. *Cf.* Royal Bank of Scotland *v.* Greenshields, *post*, p. 80.

[IN THE CHANCERY DIVISION.]

## ESBERGER *v.* CAPITAL AND COUNTIES BANK.

Reported. [1913] 2 Ch. 366. Journal, Vol. XXXIV, p. 615.

*Registration of Mortgage by Deposit.*

THE facts of this case sufficiently appear from the judgment of Sargant, J.

Sargant, J.: This appears to me to be a very plain case, but I recognise it is a case of some general importance. The action is one by Esberger and Son Limited, a company in liquidation, by their liquidator to have it declared that a certain document of charge given to the defendants, the Capital and Counties Bank Limited, is void, so far as any security is purported to be created by it on certain land of the company, by reason of its infringing the provisions of sec. 93 of the Companies Consolidation Act, 1908. Since the institution of the action the land in question has been sold, the net proceeds realising something like £350, and it is that sum, which has been substituted for the land, which has to be dealt with by my judgment. The facts are pretty clear, and such as ordinarily occur in the course of banking business. The company needing an overdraft, this was granted them by the bank upon the terms of the deposit of the deeds relating to this property, together with a letter of September 10th, 1910; and some time afterwards a formal document of charge was given to the bank on September 17th, 1910. That was executed in proper form by the company, and a resolution of the company was passed, a copy of which was at a later date forwarded to the bank, to this effect: "Signed and sealed memorandum of deposits of deeds with the Capital and Counties Bank." The only way in which the document could be said to be at all defective was this, that it had no date. Then the overdraft continued, and at a later date—namely, about June 14th, 1911, or a day or two before that, the document was, upon the request of the bank, or from something that was said, taken back to the company, or handed to the company, and the two directors of the company proceeded to initial or to sign the schedule of documents that had been deposited. Of course that had no effect whatever, really, as regards the validity of the document, but it might be useful to have it signed in case there was a possible dispute. That was returned to the bank, and the date was filled in as June 14th,

1911, by the manager of the bank without any further authority than that which had been impliedly given to the bank on September 17th, 1910, by the handing to them of the undated memorandum. The memorandum itself was in the ordinary common form used by the bank. Now, that being so, it was said by counsel for the plaintiff that the loan secured by the document of September 17th, 1910, was really the same loan as that which had been secured by the letter of September 10th, 1910, and by the previous deposit of the title deeds, and that that not having been registered the security was necessarily bad. I should not be prepared to decide in favour of that contention without hearing a great deal more argument than I have heard. It seems to me to rather conflict with what was said by Buckley, J., in the two cases that have been referred to of *Re* Defries (1904), 1 Ch., 37, and in the case of *Re* Cardiff Workmen's Cottage Company Limited (95 L. T. Rep., 669; (1906), 2 Ch., 627), but as the matter does not, in my opinion, turn upon that, I say nothing upon that point.

Then the second point that is made against the bank is this, that the security which was actually executed on September 17th, 1910, and subsequently dated June 14th, 1911, was itself void by reason of non-registration. I should have said that, as a matter of fact, the document was registered within the proper period after the date of June 14th, 1911, but in fact a long time after the proper date if the proper date was September 17th, 1910. It seems to me that that contention is right *primâ facie*, because it is not necessarily an essential part of a deed that there should be a date upon it. The date of the execution can be proved. An undated deed that has been executed and has been delivered to a person in whose favour it is intended to operate is perfectly complete without there being any date, and therefore the addition of the date was not material to the operation of the deed. In my opinion from the time when the deed was in fact executed and handed to the bank —namely, September 17th, 1910—the bank had a complete and operative charge upon the property for the amount secured by the deed, which was in fact the amount that was to become due from the company for advances then owing, and I think it is of some importance, when I come to the argument on behalf of the bank, to notice that there was a considerable sum over £1,000 then owing for further advances. But the argument in favour of the bank and for the purpose of rebutting that *primâ facie* result is threefold, or perhaps I ought to say it is twofold. There is the argument against the contention put forward as to the effect of the letter of September 10th, but as I am in favour of the bank on that point, and I do not think that it is really material for the purpose of the judgment I am delivering, I will omit that. What is said on behalf of the bank with regard to the main argument is this, that a charge is not created within

the meaning of the Companies Act, sec. 93, unless and until there is some money secured by it—that is to say, that if a document is dated on a certain day and is to secure future advances and then future advances are not made until a later date the creation of the charge is the date when the future advances are made, and when, therefore, the document becomes an effective document to secure actual money, and is not the date when the actual charge was executed.

Now, looking at the terms of sec. 93 of the Companies Consolidation Act, 1908, I do not think that that is the true effect of the section. It has been said that the section is a difficult one to construe, but where there is in fact an instrument creating or evidencing a mortgage or charge, and that is the only case I need deal with, I feel clear that on the true meaning of that section the date of the creation of the mortgage or charge is the date when that instrument was executed, and is not the date when any money is subsequently advanced so as to make an effective charge for the amount of that money. There is authority for that. There have been two cases, one before Joyce, J., and a more recent case before Neville, J., in which that view of the section has been taken. In the case before Joyce, J., perhaps it was rather specially with reference to the case of a debenture, and I therefore will not refer to that case; but in the case before Neville, J., which is the case of *Re* New London and Suburban Omnibus Company (98 L. T. Rep., 663; (1908) 1 Ch., 621), certain general observations were made. This is what was said by Neville, J.: "The construction of sec. 14 is not free from difficulty, and one has to consider whether where there is a conveyance by way of mortgage to trustees for the holders of an issue of debentures, the charge is "created" upon the execution of the mortgage; or whether it only comes into existence from time to time as the money is advanced by debenture-holders and debentures are issued which give the holder the benefit of the trust deed." The learned judge, after considering the section, came to the conclusion that the relevant date and the important date is the date when the mortgage was executed. That seems to be very much like the case where a mortgage is executed to secure future advances.

That deals with the main argument put forward on behalf of the bank, but they also put forward a subsidiary argument to this effect: that although this document may be bad as to some part of the advances that are secured, still, as regards any advances which were in fact made within the twenty-one days before the actual registration, there at any rate there is nothing to avoid the effect of the document. So it happens, if that argument prevails, the bank would get home as to the whole of their claim, because on the figures it appears that something like £600 or £700 was advanced by the bank within twenty-one days of the date of the registration and the whole amount realised by

the property is only, as I have said, something like £340. But I cannot accept that. Here you have a document which is executed for the purpose of securing, not only sums which are due at that time, but any sums that may become owing in the future. It would be impossible, I think, to say that the creation of that charge is at one date as regards the sums that were then owing and is at another date as regards sums which did become owing in the future. It would render the working of sec. 93 of the Act exceedingly difficult, and, although that ought not to cause me to come to a conclusion which is contrary to the language of the section, I think it is something that may be taken into account in construing the language of the section. The section is providing for a register which is to be kept and which is to show what are the moneys owing by the company on certain securities, so that creditors may have some notion how far the property of the company is unincumbered, and the natural date and the workable date in respect of any one particular instrument must, I think, be the date on which the instrument is executed and not the series of dates on which various sums of money may from time to time become due. The words are "mortgage or charge created," and then taking the subsequent words "unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within twenty-one days"—all those words seem to me to point to one definite period of time from which the twenty-one days must be or can be readily calculated by the registrar. In my opinion, therefore, there has been a failure to comply with the provisions of the section as regards this mortgage or charge, and the consequence is that, so far as any security is created by it, it is void as against the liquidator, and the liquidator is entitled to succeed in this action and to have paid to him accordingly for distribution the net proceeds of the sale of this land. It is a case in which the plaintiffs must have the costs of the action.

*Note.*—It would appear from this case that mere deposit of title-deeds, even if accompanied by a letter, though it creates an equitable mortgage, is not a "mortgage or charge" within sec. 93 of the Companies Consolidation Act, 1908. On the other hand, letters amounting to an undertaking to deposit title-deeds as security were held to be "a conveyance" within the Land Registry Acts in Fullerton *v.* Provincial Bank of Ireland, [1903] A.C., 309, though mere deposit was not. But for this decision, the words in sec. 93 of the 1908 Act "*together with the instrument* (*if any*) by which the mortgage or charge is created or evidenced" might be adduced as showing registration to be necessary even in the case of mere deposit.

[IN THE KING'S BENCH DIVISION.]

## CRUMPLIN *v.* LONDON JOINT STOCK BANK (LIMITED).

30 Times L.R. 99. Journal, Vol. XXXIV, p. 619.

*Collecting Cheques Crossed "Not Negotiable" and payable to Third Parties.*

THIS action was brought by the plaintiff to recover damages for the conversion of certain cheques, which were his property, and were drawn in favour of one J. A. Davies.

The case for the plaintiff, who was a stockbroker and at all material times a member of the London Stock Exchange, was that he had had in his employment as manager and bookkeeper and cashier one W. R. Rands, who from time to time introduced business on the terms of receiving half commissions. In March, 1909, Rands introduced a Mr. Davies as a person who desired to sell some shares and afterwards to do speculative business. Between 1909 and 1913 a number of transactions were said to be carried out for and on behalf of Davies. In fact, Davies had nothing to do with any of these transactions except the first, and Rands was speculating without the knowledge of the plaintiff in the name of Davies. When differences became due on these speculative transactions to the client cheques were put before the plaintiff by Rands and were drawn by him in favour of Davies. The cheques were drawn on Parr's Bank (Limited), crossed "Not negotiable," and were handed by the plaintiff to Rands to deliver them to Davies. Eight of the nine cheques were order cheques and the other one was drawn to bearer. Two of the cheques were drawn "per pro." Rands endorsed Davies's name on the cheques and paid them into an account opened by him at the Fenchurch Street branch of the defendant bank. The defendants accepted the cheques and credited the account of Rands with those amounts. The account was opened by Rands in April, 1910, and nearly three-quarters of the amounts that were paid into the account after it was opened were the proceeds of the cheques drawn by the plaintiff in favour of Davies. The plaintiff alleged that the defendants, in receiving the cheques and crediting the account of Rands with the proceeds, were guilty of negligence in failing to make any inquiry after

having been put on guard by the fact that the cheques were made payable to a person other than Rands and were crossed "Not negotiable," and in having accepted the cheques and crediting Rands with the proceeds. The plaintiff alleged that the defendants had wrongfully converted the cheques, which were his property, or that they had received the proceeds of the cheques to his use.

The defendants by their defence said that they received the cheques for Rands, who was a customer of their Fenchurch Street branch, in good faith and without negligence, and they relied upon sec. 82 of the Bills of Exchange Act, 1882, and sec. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906. They also said that the plaintiff had been guilty of contributory negligence in not examining the endorsements on the cheques after they had been paid.

Evidence was given by managers of other banks on behalf of the defendants that it was very common for cheques marked "Not negotiable" to be paid into the account of a person other than the person in whose favour they were drawn, and that that fact was not sufficient to put a bank upon inquiry and further that the cheque was drawn "per pro." would also not put a bank upon inquiry.

It was contended on behalf of the defendants that they were not put on inquiry merely because the cheques were crossed "Not negotiable." That was merely part of the general crossing, and imposed no duty upon the bank. Mr. Justice Channell held in Bevan *v.* National Bank (23 Times L.R., 65) that the fact that cheques were marked "Not negotiable" did not take away the protection given to bankers by sec. 82 of the Bills of Exchange Act, 1882. The case was different where cheques were crossed "Account of payee only." A duty was then imposed upon the collecting bank. Morison *v.* London County and Westminster Bank (29 Times L.R., 342; 18 Com. Cas., 137) * was a very different case from the present one, because there the bank knew that the man was the manager for his principal and was signing "per pro.," and therefore they were put upon inquiry, whereas in the present case the defendants did not know what Rands's business was.

On behalf of the plaintiff it was said that it was held in Morison *v.* London County and Westminster Bank that cheques signed "per pro." ought to put the bank upon inquiry. The same principle applied in the case of cheques crossed "Not negotiable." It was negligence in the defendants not to have made inquiries, especially when Rands's account was being

* This was the trial of that case before Coleridge, J., whose judgment in favour of the plaintiff was reversed on appeal.

principally fed by cheques drawn in favour of a payee other than Rands, as well as being marked "Not negotiable." Lord Brampton in Great Western Railway *v.* London and County Banking Company ([1901] A.C., 414) rather indicated that if a bank took a cheque marked "Not negotiable" they did not take it without negligence. If that were so the defendants would not be protected by sec. 82 of the Bills of Exchange Act, 1882.

Mr. Justice Pickford in his judgment said that the cheques were drawn in favour of Davies and crossed "and Co." and "Not negotiable," and were signed by the plaintiff or by one Spencer "per pro." Rands's account at the defendants' bank was opened on April 19th, 1910, with a payment in of £406 which had been received by Rands in respect of a legacy, and it continued open until the end of 1912. During that period there were not many transactions of payments in. In 1910 there were 13 payments in, three of which were in respect of cheques drawn in favour of Davies and crossed "Not negotiable," but the amount of the Davies cheques was considerably greater than the other cheques paid in. In 1911 there were two payments in of Davies's cheques and eight other payments in. In 1912 there were nine payments in all, of which four were payments in of Davies's cheques. As a rule the cheques were not for large amounts—one was for £137 and another for £84, but of the rest all were under £50; all but one were under £30, and all but two were under £20. They were paid in at considerable intervals.

The plaintiff said that in the circumstances the defendants had no right to collect those cheques and place the proceeds to Rands's account without making some inquiry. It was admitted that the bank had collected the cheques *bonâ fide* for a customer, but the question was whether they had done so without negligence. One or two other defences had also been suggested. It was said that if Rands was not entitled to receive payment of the cheques then Davies was the true owner and the plaintiff was not entitled to sue. That was opposed to the facts. It was true that the plaintiff did say in the witness-box that he drew the cheques for the person operating the account. But it was clear that he did that because he thought that person was Davies, and he did not intend to draw them in favour of any person who happened to be operating the account. It was very like the case of North and South Wales Bank *v.* Macbeth (24 Times L.R., 397; (1908) A.C., 137). Rands in putting the cheques before the plaintiff made a false representation that it was Davies's account, whereas in fact there was no such account. He did not see anything in that defence. It was also suggested that the bank could not be held to be negligent because the cheques did not come under the notice of the manager and

only passed through the hands of clerks, who could not be expected to know all about the Bills of Exchange Act. He could not accept that suggestion. It was no defence for a bank to say that they were so busy and had such a small staff that they could not make inquiries. If they could not make inquiries when necessary they must take the consequences.

The question came to this—whether the defendants were negligent in this case in not making inquiries. If they had made inquiries of Rands they might or might not have been satisfied with his answer, but there was no doubt that if they had made inquiries of the plaintiff the whole matter would have come out. Were they negligent in not doing that? It was said on behalf of the plaintiff that the mere fact that the cheques were crossed "Not negotiable" made it negligence in the defendants to take them without inquiry. A *dictum* of Lord Brampton in Great Western Railway *v.* London and County Banking Company ([1901] A.C., 414) was cited in support of that contention. But that fact certainly was not conclusive evidence of negligence. It was, however, contended that it was *primâ facie* evidence of negligence for the bank to take without inquiry a cheque crossed "Not negotiable" drawn in favour of a person other than the person to whose account it was paid in. The *dictum* of Lord Brampton's had been criticised by various text-writers. It seemed to him that there was great force in the statement by one of them that in view of the earlier legislation as to cheques so crossed, and as the section purported to apply to "not negotiable" cheques, the mere taking of a "not negotiable" cheque ought not to be held to be evidence of negligence. It would be remarkable if, while the section provided that bankers were protected if they took a crossed cheque in good faith and without negligence, it should be possible to hold that the bankers were negligent merely from the fact they took a cheque so crossed, unless they gave rebutting evidence that they had made proper inquiries before taking it. His Lordship thought it was a matter which ought to be taken into consideration together with all the other matters, and that it did not go higher than that. In the present case evidence was given by persons of importance in the banking world, who said that transactions of this kind were not uncommon. One witness said that 20 to 25 per cent. of the cheques paid into his bank were cheques of this description, although that was probably due to a special reason. At any rate, it was quite clear from that evidence that the practice for cheques of this description to be paid in was so common as not to raise suspicion. It came down to a mere question whether, looking at the total number of the payments in, the number of these cheques that were paid in, their amount, and the period over which they were paid in, those circumstances were sufficient to

put the defendants upon inquiry. Some of the witnesses thought that the case was near the line. He thought that if the account had been opened with a small sum, followed by a succession of large cheques similar to Davies's cheques, he would have no difficulty in holding that they ought to have put the bank upon inquiry. But when, as in this case, the cheques were for small amounts, and when they were paid in at such long intervals, it was not negligence in the bank not to have made inquiry, and therefore as regards the cheques which were not signed "per pro." the defendants were entitled to judgment.

Two of the cheques were signed "per pro." Mr. Justice Coleridge had held in Morison *v.* London County and Westminster Bank (*ante*) that the fact that cheques were signed "per pro." ought to put a bank upon inquiry. His Lordship did not think that Mr. Justice Coleridge meant to hold that whenever cheques were drawn "per pro." that fact was enough to put the bank upon inquiry. He thought that that decision must have been intended to apply only to the facts of that particular case. In the present case he did not think that the fact that two of the cheques were signed "per pro." was an intimation that there was probably or possibly anything wrong in the transaction. But it was an intimation that Spencer had only a limited authority to sign the cheques, and the bank took the chance whether or not the cheques were within that authority. He did not think that the defendants were put upon inquiry by the fact that the cheques were signed "per pro.," and therefore he did not think they had been guilty of negligence. There would therefore be judgment for the defendants.

*Note.*—The reference in this case to Morison *v.* London County and Westminster Bank is to the earlier stage of that case, the trial before Lord Coleridge, J., who gave judgment for the plaintiff, which judgment was reversed by the Court of Appeal. In the Court of Appeal, Lord Reading, L.C.J., referred to the "not negotiable" crossing in somewhat ambiguous terms. See *post*, p. 91. In the present case, Pickford, J., though he deals with the question, appears in the end to have accorded little weight to this crossing as putting the bank on inquiry. In Turner *v.* London Provincial Bank, Journal of the Institute, Vol. XXIV, p. 220, evidence was given that at some banks special care was taken in dealing with cheques marked "not negotiable." It is unfortunate that, more than forty years after the passing of the Bills of Exchange Act, there should still be uncertainty and question about the position of the collecting banker with regard to cheques so crossed, when the statute itself does not appear to give ground for such doubts.

The suggestion that a banker should refer to the drawer of a cheque before collecting it for a customer appears impracticable, and there is no other way, as Pickford, J., seems to admit, in which the banker can really verify any endorsement other than his customer's.

This case is another of those which ignore the plea of exigencies of business, *cf.* Ross *v.* London County and Westminster Bank, 35 Times L.R., 315, *post*, p. 205.

With regard to the effect which sudden fluctuations or increases in the payments in should have on the collecting banker's mind, this case should be compared with Commissioners of Taxation *v.* English, Scottish and Australian Bank, *post*, p. 220, where the Privy Council saw nothing suspicious about a large payment in the day after the account had been opened with a small one, and with Morison *v.* London County and Westminster Bank, *post*, p. 91.

[IN THE COURT OF APPEAL.]

## DE LISLE *v.* UNION BANK OF SCOTLAND.

Reported. [1914] 1 Ch. 22. [1913] W.N. 317. Journal, Vol. XXXV, p. 45.

*Rights of a Bank as Sub-mortgagee.*

This was an appeal by the Union Bank of Scotland from a decision of Mr. Justice Warrington, which raised the question which of two innocent parties ought to suffer for the fraud of a third party in the following circumstances.

In July, 1908, the plaintiff wished to raise £4,000 to enable him to complete the purchase of premises known as Bow Bridge Wharf, in West Ham, and his solicitor, Harold Crick, agreed to advance him such sum on the security of a mortgage of the premises, together with £3,000 Four per Cent. Perpetual Consolidated Debenture Stock of the Grand Trunk Railway Company of Canada as collateral security. On July 8th, 1908, the plaintiff transferred the debenture stock into the name of Harold Crick, and by a mortgage dated July 17th, 1908, which was in fact executed on July 8th, 1908, he conveyed the property to Crick by way of mortgage for securing £4,000. Before the execution by the plaintiff of the transfer and mortgage, Crick represented to the plaintiff that he was borrowing £4,000 from his bank on the same security as he was obtaining from the plaintiff, and that the bank required that the debenture stock should be transferred to its nominees, and that the plaintiff must sign a memorandum in the following form :—

"To the Union Bank of Scotland, Limited : At the request of Mr. Harold Crick, of Billiter Square Buildings, E.C., I have transferred £3,000 Perpetual Four per Cent. Consolidated Debenture Stock of the Grand Trunk Railway of Canada into the names of Messrs. Arthur Dalrymple Gairdner and Thomas Henderson as trustees for you to be held as collateral security for your advances to Messrs. Rose-Innes, Sons, and Crick, and subject to their arrangement with you."

It appeared that to induce the plaintiff to sign this, Crick had represented to him that notwithstanding the terms of the memorandum the premises and debenture stock would be re-transferred to him on his paying off the £4,000, and the plaintiff alleged that he had signed the memorandum on the faith of these representations.

The plaintiff also alleged that shortly before the present action he ascertained that Crick had wrongfully and without his knowledge deposited the mortgage and title deeds of the property comprised therein with the defendant bank on September 23rd, 1911, as security for all sums due or which might become due from him to the bank; and by a deed dated December 2nd, 1911, Crick executed a sub-mortgage of the property to secure (with other securities) a sum of over £18,000 due from him to the bank. The bank claimed to hold the mortgage as security for the full amount of £4,000 and interest separately from and independent of the debenture stock transferred to them; but in April, 1912, the plaintiff began this action, claiming:—(1) A declaration that the defendant bank as sub-mortgagees, were only entitled to hold the mortgage of July 17th, 1908, as security for £1,000 and interest, or alternatively that the mortgage and the £3,000 debenture stock were security for £4,000 and no more; (2) an account on this footing of the declaration of what was due by the plaintiff to the defendant bank; and (3) to redeem the premises comprised in the mortgage and the debenture stock on payment of the amount found due. Crick was adjudicated a bankrupt on December 20th, 1912.

The plaintiff relied on the fact that the bank had failed to make any inquiries with regard to the mortgage and state of accounts between the mortgagor and original mortgagee, and contended that if proper inquiries had been made the bank would have ascertained the true state of affairs, and that the mortgage and the transfer of £3,000 debenture stock constituted one security for the sum of £4,000.

Mr. Justice Warrington held that the bank as assignee by way of sub-mortgage took subject to all equities subsisting between the debtor and the original creditor at the date of the assignment, and he made a declaration as asked.

The bank appealed.

The Master of the Rolls said:—The facts as found by Mr. Justice Warrington may be shortly stated, and I do not think there is any great difficulty in applying the law to the facts. The plaintiff had contracted to buy some property at West Ham. To complete the purchase he wanted to borrow £4,000 on the security of the property itself, but he was told by his solicitor, Mr. Crick, that a mortgagee would require some further security. The plaintiff had £3,000 debenture stock, which he was willing to apply for the purpose. At first it was proposed that one of Mr. Crick's clients should advance the money, but Crick said that he could himself advance it, and could obtain it from the bank on the same security as that on which he was lending the £4,000 to the plaintiff. The agreement between the

plaintiff and Crick was that the land should be the principal security, and the debenture stock a collateral security. The transaction was carried into effect by a mortgage of the land for £4,000 to Crick and by a transfer of the debenture stock into Crick's name. This was the beginning and end of the transaction between the plaintiff and Crick. The £4,000 was provided by Crick for the plaintiff and the purchase was completed. Crick, however, induced the plaintiff to execute a memorandum giving a security on the debenture stock in favour of the bank, not merely as a security for the £4,000, but for all the advances of the bank to Crick and the debenture stock was transferred into the names of trustees for the bank. The execution of this document was obtained by a representation by Crick that the true nature of the transaction should not be affected by the form of the memorandum. At a later date the mortgage was deposited by Crick with the bank. Now immediately before that deposit what were the rights of the plaintiff against Crick? It seems to me clearly that he had a right, on payment of £4,000, to get back his land and also the debenture stock, or, if the stock had been so dealt with that Crick could not return it, the plaintiff would have been entitled to get back the land on payment of £4,000 less the value of the stock. What, then, was the position of the bank? So far as the stock is concerned, they being wholly ignorant of Crick's fraud are entitled as against the plaintiff to apply the stock towards the general indebtedness of Crick. But when the plaintiff comes to redeem the mortgage of the land I think the bank can be in no better position than their assignor. A transaction between the plaintiff and Crick after the mortgage, but before the sub-mortgage to the bank, raised an equity by which the assignee is bound. This was the view taken by Mr. Justice Warrington. One point was strenuously argued. It was first said that the plaintiff is estopped from denying that the £4,000 was advanced by Crick to the plaintiff. The plaintiff does not deny and never has denied that £4,000 was advanced. I do not understand that estoppel can have any place if the statement is true. It only arises when a person is sought to be prevented from asserting the truth. It was then said that in truth £4,000 was only paid by means of money received from the bank. I confess my inability to appreciate this point. I do not think it necessary to discuss the numerous authorities cited, all of which are, as it seems to me, consistent with the conclusion arrived at by Mr. Justice Warrington. The appeal must be dismissed with costs.

The Lords Justices delivered judgment to the same effect.

Appeal dismissed.

[IN THE KING'S BENCH DIVISION.]

## FULLER *v.* GLYN, MILLS, CURRIE AND CO.

Reported. [1914] 2 K.B. 168. 30 Times L.R. 162. Journal, Vol. XXXV, p. 48.

*Advances on Canadian Pacific Railway Share Certificates.*

THE plaintiff claimed to be the owner of certain shares in the Common stock of the Canadian Pacific Railway, and entitled to the possession of the certificates representing such shares. He alleged that the defendants wrongfully detained the certificates, and that they had wrongfully converted the shares and certificates to their own use. He now claimed the return of the certificates or the value of the shares, and damages for their detention.

The matter arose out of the frauds committed by a firm of stockbrokers, Messrs. Inchbald and Son, who were formerly members of the London Stock Exchange.

The defendants said that the certificates were taken by them in good faith in the ordinary course of their business as bankers from Inchbald and Son as security for loans and overdraft, and that they were entitled to hold the same for an amount largely exceeding their value. They further said that the plaintiff was estopped from asserting his title against them because the certificates deposited with them were certificates of shares registered in the name of Harold J. Harmsworth, and bore endorsed thereon transfers signed in blank by the registered owner.

The plaintiff was introduced to Messrs. Inchbald, who were members of the Stock Exchange and of good repute, and he employed them to buy shares for him for investment; he did not speculate. He bought on September 19th, 1907, October 31st, 1907, November 5th and 26th, 1907, a number of shares in the Canadian Pacific Railway, amounting in all to 310. Of this number 50 were sold while 110 were deposited with the defendants and were the subject of the present action. These 110 shares were registered in the name of a Mr. Harmsworth: the certificates were in his name and the form of transfer which was on the back thereof was signed by him. The plaintiff asked that they should be put into his own name, but he was told by Messrs. Inchbald that it was not usual to do so, that some expense

would be incurred, as well as the risk of losing the certificates if they were registered. The plaintiff therefore left the certificates with them.

The learned Judge held that the defendants took the shares in good faith. He referred to London Joint Stock Bank *v.* Simmons, L.R., 13 A.C., 333, as showing conclusively that bankers are not put on inquiry by the mere fact that a stockbroker brings them securities in various names and deposits them *en bloc* as security for his general account. He said he was not pressed by the contention that the fact of the transfer from the name of Harmsworth into the names of nominees of the bank was not a dealing in the ordinary course of business and ought to have affected the defendants with notice that the shares were not Messrs. Inchbald's shares. The fact that they were not in their name did not show this. The plaintiff had in fact put them into Inchbald's power. On this footing, although the exact point had not been decided before, he considered the case covered by the principles laid down in Colonial Bank *v.* Cady, 15 A.C., 267. Citing the judgments in that case, Pickford, J., comes to the conclusion that they only deal directly with cases where the transfer is actually signed by the registered owner of the securities when left by him in the hands of the brokers. That was not the case here, and the Judge puts the question : " Does the principle of Colonial Bank *v.* Cady govern the present case ? " and answers it as follows :—

" I must consider the principle on which this estoppel rests. In my view, it does not rest on the mere manual act of signature. That act is not an essential element in the estoppel. Its importance, where it exists, is as one step towards placing in the power and disposition of another an instrument which carries with it a representation of authority to that other person to deal with it, and which, when produced to a third person, will convey to that third person that such an authority exists. If that be the principle, I see no difference between the case where the owner signs and hands to a broker and leaves in his hands a document so signed, and the case where the holder of a document signed by the registered owner puts it into the hands of his broker, or the case (which is this case) where the true owner, never having had possession of the document, but knowing it to be in such a condition that the broker can deal with it, allows it to remain in the broker's possession and thereby enables the broker to part with it to another who takes it on the faith of the apparent authority of the broker to deal with it. In my view the plaintiff, though he did not actually sign the transfer himself, gave rise to just the same mischief as if he had affixed his signature himself."

Judgment for the defendants.

[IN THE SCOTTISH COURT OF SESSION.]

## ROYAL BANK OF SCOTLAND *v.* GREENSHIELDS.

Journal, Vol. XXXV, p. 172.

### *Bank's duty to Guarantor.*

In this case the duties of a banker as to the disclosure of material facts to a prospective guarantor were clearly set forth.

The guarantor contended that there was material misrepresentation by the bank agent who had informed him of the amount of the customer's existing overdraft of £300, but had omitted to mention the fact that the bank held bills for £900.

The Lord President, in giving judgment in favour of the bank, said the law applicable to the case was well settled. A bank agent was entitled to assume that an intending guarantor had made himself fully acquainted with the financial position of the customer whose debt he guaranteed, and was not bound to make any disclosure regarding the customer's indebtedness to the bank. If he did, either voluntarily or in answer to a question put, make an untrue or erroneous representation, the guarantor who had relied on that erroneous representation would be free. The only circumstance in which a duty to disclose would emerge, and a failure to disclose would be fatal to the bank's case, would be where a customer put a question, or made an observation in the hearing of the bank agent, which would inevitably lead anyone to the conclusion that the intending guarantor was labouring under a misapprehension as to the state of the customer's indebtedness.

*Note.*—*Cf.* National Provincial Bank *v.* Glanusk, [1913] 3 K.B., 335, *ante*, p. 63.

[IN THE KING'S BENCH DIVISION.]

## HARDING *v.* LONDON JOINT STOCK BANK (LIMITED).

From the Times, January 21st, 1914. Journal, Vol. XXXV, p. 220.

*Collecting cheque payable to Employer—Extent of Bank's duty of inquiry.*

The plaintiff claimed to recover damages for the conversion of a cheque for £92 19s. 9d., dated September 26th, 1911, and drawn by S. Schneiders and Sons, payable to the order of J. Bland, Smith-Harding, and Co., the property of the plaintiff. Alternatively, the plaintiff claimed £92 19s. 9d. as money received by the defendants to his use.

The plaintiff had carried on business for many years under the name of Bland, Smith-Harding, and Co., as waterproofers, at Roscoe Street, Finsbury. The plaintiff did not take an active part in the business, which was managed by a Mr. Black. A person named Francom was employed in that business as cashier and book-keeper at a salary of £250 a year. It was the duty of Francom to endorse the cheques and pay them into the firm's account at the Old Street branch of the London County and Westminster Bank. In April, 1913, Francom admitted that he had endorsed the cheque in question and paid it into his own account at the Regent Street branch of the London Joint Stock Bank. The cheque was dated September 26th, 1911, and was paid into the bank on September 28th, 1911. Francom had not previously had an account with the defendant bank. He received a cheque-book on September 30th, and had since drawn out the amount of the cheque. Francom's act in paying the cheque into his own account at the defendant bank was wholly unauthorized. The defendant bank collected the cheque and credited it to Francom's account. The cheque was crossed generally, and the bank received payment thereof. It was not suggested that the bank had not acted in good faith. Francom was entirely unknown to the defendant bank. He was introduced to the manager of the Regent Street branch on September 28th by a Mr. Elliott, who was a customer of the bank, for the purpose of opening an account. The bank manager did not ask who he was or what his employment was; he simply told

Francom to sign the signature-book and "to open" outside. Thereupon Francom went outside the manager's room and paid the cheque over the counter into his own account. The manager having had his attention drawn by the cashier to the fact that the cheque was not made in Francom's favour, told Francom that they ought to have written confirmation that he was authorized to deal with the cheque, and he asked Francom to get that confirmation. Francom went away and wrote a letter in the name of Bland, Smith-Harding, and Co., that the cheque was all right. That letter referred to "our Mr. Francom," and it was contended that the bank manager ought therefore to have been put upon further inquiry.

Evidence was given by the managers of several banks that it was the usual practice to open an account upon a personal introduction, and that when the first cheque paid in was not drawn in favour of the person opening the account it was usual to ask him to obtain a confirmation from the person in whose favour it was drawn.

His Lordship summed up the case and left the following question to the jury :—

Did the bank take the cheque without negligence—that was, did they take the reasonable and proper precautions which they ought to have taken?

The jury returned a verdict for the plaintiff, and judgment was entered accordingly.

*Note.*—There are a good many other cases on this question of taking and following up references on opening an account. Turner *v.* London and Provincial Bank, Journal of the Institute, Vol. XXIV, p. 220; Ladbroke *v.* Todd, *post*, p. 89; Guardians of St. John's, Hampstead *v.* Barclays Bank, *post*, p. 282, are instances. They are *nisi prius* cases, but in view of them it is clear that the matter is one to be seriously reckoned with in any litigation turning on sec. 82. The *dictum* of the Privy Council in Commissioners of Taxation *v.* English, Scottish and Australian Bank, [1920] A.C., 683, *post*, p. 220, that under the section "It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque," referring, as it does, to a first transaction, is inconsistent with the other authorities and cannot be implicitly relied on.

[IN THE COURT OF APPEAL.]

## HEWSON *v.* SHELLEY.

Reported. [1914] 2 Ch. 13; [1913] 2 Ch. 384; [1914] W.N. 127.
Journal, Vol. XXXV, p. 289.

*Finding of a Lost Will—Prior Sale of Estate.*

An important point as to the security of the title acquired by a purchaser of real property from an administrator was raised in this appeal from a decision of Mr. Justice Astbury, which is reported in The Times of July 18th, and in 29 The Times Law Reports, p. 699.

Mr. George Hewson died on January 30th, 1899, without issue, but leaving a widow, Emma Hewson. No will was found, and letters of administration were accordingly granted to the widow on June 13th, 1899. She paid debts and distributed the estate in due course of administration. The estate included certain freehold property known as Ovington Glebe, Southampton, and on October 13th, 1902, the administratrix sold this property to Sir John Shelley for £3,500, and conveyed it to him. Of the proceeds one-third was invested as dower for the widow, and the remainder was divided among three co-heiresses of the deceased.

In September, 1911, the widow died, and her executor, in looking through her papers, found in an envelope at the back of an old writing desk the will of her husband, George Hewson. The document was between the back and shelves of some pigeon-holes, where it appeared to have been placed by the testator. This will was dated April 24th, 1894, and by it the testator left his property to his widow for life and after her death to his cousin, one of the plaintiffs, whom he exhorted "to hold Ovington Glebe as an heirloom and on no account to sell it, but should such occur," then the proceeds were to be equally divided among certain persons named. The testator then appointed the plaintiffs his executors. On February 9th, 1912, the letters of administration granted to Emma Hewson were revoked, and probate of the will was granted to the plaintiffs.

The executors brought proceedings seeking to set aside the sale of Ovington Glebe to Sir John Shelley. The defendants were Sir John Shelley and two mortgagees to whom Sir John had mortgaged the property after the sale.

Mr. Justice Astbury held that the grant of administration to

the widow was not merely voidable, but void *ab initio*, and that the sale of Ovington Glebe by the widow before the revocation of the letters of administration was therefore also void.

The defendants appealed.

The appeal was allowed.

The Master of the Rolls in giving judgment, referred to the case of Graysbrook *v.* Fox, decided in the King's Bench in the 7th year of Queen Elizabeth, and cited in the Chancery Division Court, and held that the decision in that case was illogical and could not be upheld.

He then proceeded as follows :—

The contention which prevailed in the Court below leads to startling results. A debtor of the deceased man might pay the administrator and would get a good discharge. If sued by the administrator he would not be allowed to challenge the title of the administrator. The purchaser could not resist a decree for specific performance of a contract for sale by the administrator. In short, it seems to me that the person for the time being clothed by the Court of Probate with the character of legal personal representative is the legal personal representative and enjoys all the powers of a legal personal representative unless and until the grant of administration is revoked or has determined. If this view is not right no person could safely deal with, or accept a title from, an administrator, for it is impossible to prove that there may not be a will. The decision of Mr. Justice Barnes in the Goods of Wright (1893, P.D., 21) is a direct authority in favour of the view which I have taken. In that case administration was granted until the original will or an authentic copy should be brought into the registry for the very purpose of enabling the sale of leaseholds to be completed and limited to that purpose. In my opinion Graysbrook *v.* Fox (*ante*), must be regarded as no longer law.

It remains to consider the effect of the Land Transfer Act, 1897, sec. 2. I think it confers upon the legal personal representative for the time being the same powers with reference to real estate as he would have as to personal estate, subject to some exceptions not material for the present purpose. If, as I hold, the administratrix could have sold and conveyed a leasehold, I think she could convey, as she did, the freehold property to Sir John Shelley. I prefer to base my decision on the general grounds above stated and not upon any special provisions in the Probate Act, 1857, although I think there is a good deal in that Act which assists the appellant. There is, however, a separate point under sec. 70 of the Conveyancing Act, 1881. It seems to me that the order granting administration to the

widow was a judicial act, and even if that grant could be held void on the ground of want of jurisdiction, the title of the purchaser would be protected under that section. In my opinion the appeal succeeds and the action must be dismissed, with costs here and below.

The Lords Justices also read judgments allowing the appeal.

*Note.*—It may be that the discovery of a hidden will after grant of administration is not a common occurrence in real life. But if the judgment of Astbury, J., had stood, such an event might have had serious consequences to bankers. Mortgages, deposit of title deeds or any other security executed or effectuated by the administrator duly appointed by the court would have become void and worthless on the revocation of the grant, and the bank left to its personal remedy, if any, against the administrator. Presumably money drawn out by the administrator would have had to be made good to the executors or beneficiaries under the will.

The reversal of that judgment puts the matter on a rational basis, treating the administrator *pro tem.* as *de jure*, as well as *de facto*, representing the estate while exercising his functions.

[IN THE KING'S BENCH DIVISION.]

## THE NATIONAL PARK BANK OF NEW YORK *v.* BERGGREN AND CO.

30 Times L.R. 387. Journal, Vol. XXXV, p. 375.

*Bill of Exchange—"Complete and regular on the face of it."*

Mr. Justice Pickford said that the action was brought upon a bill of exchange which was drawn by the Pensacola Tar and Turpentine Company upon the defendants and which that company had discounted or handed to their bankers, the First National Bank, Pensacola, whose agents in New York were a firm of C. Schumacher and Co. The bill of exchange was purchased by the plaintiffs on May 9th, 1912, from Schumacher and Co. for $1,407·38. Therefore the plaintiffs gave value for the bill. The bill had been drawn in payment for some turpentine which had been sold by the Pensacola Company to the defendants. When the bill was bought by the plaintiffs it was not accepted. The plaintiffs received the bill on May 9th, and it was not accepted by the defendants until May 20th. The defendants at first wished to accept the bill subject to approval of the goods. The representatives of the plaintiffs in London, however, refused to take an acceptance in that form, and the bill was eventually accepted unconditionally in the usual way. A dispute arose between the defendants and the sellers as to the goods, and the defendants said that they were not liable to pay for them and refused to meet the bill, saying that either the consideration for the bill had failed or that they had a counterclaim against the sellers for the amount of the bill. Schumacher and Co. on July 24th, 1912, wrote to the plaintiffs and requested them to send on to them the draft drawn on the defendants which had been refused, and said that they (Schumacher and Co.) would pay for the face of drafts, together with cable charges and expenses. At that time Schumacher and Co. and the First National Bank, Pensacola seemed to have been intending to take up the draft and pay it. If that had been done this difficulty would not have arisen. That, however, was not done, and the draft remained in the plaintiff's hands. Later a question arose as to what was to be done with regard to it. The plaintiffs had the right to sue either the acceptor or a prior endorser or the drawer of the bill. A correspondence ensued between the

plaintiffs and the First National Bank of Pensacola and the Pensacola Tar and Turpentine Company, the result of which was that the Pensacola Tar and Turpentine Company requested the plaintiffs to sue the defendants in their own name, and agreed that if the plaintiffs did that they would guarantee to pay all expenses, and also to pay the amount of the bill if the plaintiffs failed to recover it from the defendants. That was done in order that the defendants might not be able to set up against the plaintiffs the defence which they could have set up against the Pensacola Tar and Turpentine Company, the sellers of the goods.

The defence set up by the defendants to this action by the plaintiffs was first a general defence, and secondly a defence special to this case. It was said that the plaintiffs were not holders in due course. A holder in due course could sue the acceptor on the bill free from the rights of the acceptor against the drawer. Sec. 29 (1) of the Bills of Exchange Act, 1882, provided that—

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely :—(*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Sec. 38 provided that a holder of a bill might sue on the bill in his own name and "where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill." It was contended by the defendants that the plaintiffs were not holders in due course when the bill was negotiated to them, because the bill was not complete, as it had not at that time been accepted, and that therefore the plaintiffs were not entitled to sue the acceptors, the defendants, on the bill free from the rights which the defendants had against the drawers of the bill. That contention, which had puzzled his Lordship for some time, was due to a misapprehension as to the nature of a bill of exchange. A bill of exchange was defined in sec. 3 (1) as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer." The section therefore required that a person should draw the bill, that it should be directed to some particular person, with a direction to that person as to the person to whom he should pay the bill, but the section did not require that the person to whom the bill should

be addressed should have accepted it. It therefore seemed to his Lordship to be clear that this bill when taken by the plaintiffs was a complete bill, notwithstanding that it had not, at that time, been accepted. That was not new law, because Mr. Justice Patteson held in Reg. *v.* Kinnear (2 Moo. and Rob., 117) that an instrument drawn by A upon B, requiring him to pay to the order of C a certain sum at a certain time, "without acceptance," was a bill of exchange, notwithstanding that the bill said that acceptance was not required. That was a criminal case and therefore the definition of a bill of exchange would be applied very strictly. The same Judge expressed the same view in the course of the argument in Davis *v.* Clarke (13 L.J., Q.B., 305). The first point of the defendants therefore failed.

The second point was that in consequence of the agreement between the plaintiffs and the drawers of the bill, the plaintiffs must be taken to be suing merely as trustees for the sellers, the drawers of the bill, and that, therefore, the defendants were entitled to set up as against the plaintiffs the same defences as they would be entitled to set up against the sellers. The short answer to that point was that the plaintiffs were not suing as trustees for the drawers. A trustee would have to account for the money which he recovered. But the plaintiffs were entitled to keep the money they recovered; the drawers merely guaranteed to indemnify the plaintiffs against expenses and to pay the amount of the bill if the plaintiffs sued the defendants instead of suing them. Therefore that point failed also. There would be judgment for the plaintiffs for the amount claimed.

*Note.*—This case must now be read subject to the decision of the House of Lords in Mcdonald *v.* Nash, *post*, p. 331.

There it was held that a bill was wanting in a material particular and incomplete, although drawn to drawer's order and accepted, so long as it was not endorsed by the drawer.

But the contention in the present case went further. It involved that there never could be a holder in due course competent to sue drawer or prior endorser on dishonour by non-acceptance. The Bills of Exchange Act carefully provides for such contingency. Nor could an unaccepted bill ever be issued within sec. 2, which requires that the bill shall be "complete in form."

## LADBROKE AND CO. *v.* TODD.

Reported. [1914] W.N. 165. 30 Times L.R. 433. Journal, Vol. XXXV, p. 377.

*What is a "Customer?"*

The plaintiffs were a firm of bookmakers. The defendant was a banker. One of the plaintiffs' customers, a Mr. Jobson, had won some money from them. They posted to him in payment of his winnings a cheque drawn to his order on the National Bank and crossed "account of payee." A thief managed to extract the letter containing the cheque from the pillar-box in which it was posted, and, having fraudulently endorsed Mr. Jobson's name upon it, took it to the defendant's bank, represented himself to be Mr. Jobson, and opened an account with the defendant in that name, paying in the cheque for that purpose. He told the defendant that he wished the cheque cleared at once so that he might draw against it that day if possible. The defendant got the cheque cleared that afternoon, and the following day the thief drew on the account for the amount of the cheque. The fraud was shortly afterwards discovered, whereupon the plaintiffs sent Mr. Jobson a second cheque for his winnings, and took an assignment from him of his rights, if any, in the stolen cheque. They brought the action in the alternative, as holders of the cheque or as assignees, to recover the proceeds collected by the defendant as money had and received to their use. The defendant claimed the protection of sec. 82 of the Bills of Exchange Act, 1882, which provides that "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." For the plaintiffs it was contended that the relation of banker and customer being that of debtor and creditor, and there being no debt due by the banker in respect of a cheque paid in for collection until the cheque has been cleared, the banker cannot claim the protection of the section for the receipt of payment of the cheque with which an account is opened, inasmuch as he does not receive the payment "for a customer," the relation of banker and customer not commencing till after the money has been received.

Bailhache, J., found as a fact that though the defendant had received payment of the cheque in good faith he had not taken reasonable precautions to safeguard the interests of persons who might be the true owners of the cheque, and therefore could not claim the protection of the section. But at the same time he expressed the opinion that but for his want of due care he would have been entitled to such protection, as having received the payment for a customer. He was of opinion that the relation of banker and customer begins as soon as the first cheque is paid in and accepted by the banker for collection, and not merely when it is paid.

Judgment for the plaintiffs.

*Note.*—This case and Commissioners of Taxation *v.* English, Scottish and Australian Bank, [1920] A.C., 683, in the Privy Council, *post*, p. 220, are authorities that a man may be a customer by virtue of and in relation to a single and first transaction, the opening an account with a cheque for collection. This view is contrary to that expressed in Matthews *v.* Williams Brown and Co., 10 Times L.R., p. 386; Great Western Railway *v.* London and County Bank, [1901] A.C., 414, and Lacave *v.* Credit Lyonnais, [1897] 1 Q.B., 148. It is quite inconsistent with the ordinary interpretation and acceptation of the word "customer."

[IN THE COURT OF APPEAL.]

## MORISON *v.* LONDON COUNTY AND WESTMINSTER BANK (LIMITED).

Reported. [1914] 3 K.B. 356. 30 Times L.R. 481. Journal, Vol. XXXV, p. 368.

*Cheques Drawn in Fraud of Authority to Draw—True Owner—Negligence of Collecting Banker Negatived by Conduct of True Owner—Effect of Per-pro—Damages for Conversion.*

THIS case raised points of great interest to bankers and other business men. The appeal was brought by the defendants in the action against a judgment of Mr. Justice Coleridge, reported in 29 The Times Law Reports, 342, and Journal, Vol. XXXIV., p. 276. The facts of the case are sufficiently stated in the judgments hereinafter set out.

Each member of the Court read a judgment in writing as follows :

The Lord Chief Justice said :—

"The plaintiff brought his action to recover £1,885 3s. 9d. damages for the conversion of 50 cheques drawn upon and honoured by the National Provincial Bank for his account, or alternatively for the same amount as money had and received by the defendants to his use. At the trial of the action without a jury Mr. Justice Coleridge gave judgment for the plaintiff against the defendants for the amount claimed, and the defendants appeal from that judgment. The plaintiff carried on business as an insurance broker in the City of London in the name of Bruce Morison and Co. In 1888 he gave authority to one Harry Abbott, who had been some years in his employment, to draw cheques for the purpose of the plaintiff's business on the banking account of Bruce Morison and Co. at the National Provincial Bank, and to sign them 'per pro. Bruce Morison and Co., H. Abbott,' and the plaintiff gave written directions and authority to such bank to honour for his account all cheques so signed by Abbott. From 1888 until the end of 1911 Abbott signed cheques per procuration for the plaintiff which were duly honoured. In 1900 the plaintiff, who continued to have implicit confidence in Abbott, appointed him manager of his business

in the City, and thenceforward until the end of 1911 Abbott acted as manager of such business. About January, 1912, the plaintiff discovered that Abbott by means of the per pro. signature had drawn a number of cheques on the plaintiff's aforesaid banking account, and had fraudulently applied them to his own use.

"In June, 1905, Abbott had opened a banking account in his own name for his own private purposes and without the knowledge of the plaintiff at the Euston branch of the defendant bank. He was introduced to the defendants by one of their staff as the manager of a firm of insurance brokers. He continued to draw cheques upon and pay cheques into this account with the defendants until the beginning of 1912, when the defendants were first made aware that Abbott had grossly abused the plaintiff's confidence, and had by means of the per pro. signature drawn a number of cheques for his own purposes on the plaintiff's account at the National Provincial Bank, which had been duly honoured. It appeared that from May 29th, 1907, until November 23rd, 1911, 50 cheques so drawn, and when necessary so endorsed, for sums amounting, in the aggregate, to £1,885 3s. 9d. had been paid by Abbott into the defendants' bank at Euston for collection by the defendants on his behalf. All the cheques, with the exception of two open or uncrossed cheques, were crossed 'London County and Westminster Bank.' The sums were collected in the ordinary way by the defendants during the said period from the National Provincial Bank, and the plaintiff's account was duly debited with the same.

"The plaintiff makes no complaint against the National Provincial Bank. It is clear that they were bound, in pursuance of the directions and authority given in 1888, to honour the said cheques on his account. The defendants placed the amount of such cheques to the credit of Abbott's account with their branch as and when they were paid in, and Abbott drew against them when the cheques had been cleared. During the currency of his banking account with the defendants Abbott paid in other moneys and cheques. It was, as the manager said, not a very active account, but a satisfactory account from the bank's point of view. Abbott drew cheques against his credit balance with the defendants, which were in the ordinary course duly honoured by them.

"Upon these facts the plaintiff, in my judgment, is entitled, *primâ facie*, to recover the sum claimed, either as damages for conversion or as money had and received. Lord Ellenborough, in M'Combie *v.* Davies (6 East, p. 540) said :—'A man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?' This principle has been frequently applied in actions to recover

the proceeds of cheques or other negotiable instruments for the payment of money, collected by a bank without authority. (See Gordon *v.* London City and Midland Bank, [1902] 1 K.B., at pages 264-5, and Fine Arts Society *v.* Union Bank (Limited), 17 Q.B.D., 705, and cases therein cited.)

"In the present case the defendants were not mere intermediates, but became the holders of the cheques when these were issued to them by Abbott. It is not disputed that the defendants received them in good faith, but it is contended that they received them from a person who had no authority to draw them or to issue them to the defendants, and could give no title, or only a defective title, to the defendants. The cheques were at all times, till issued, the property of the plaintiff. They never were the property of Abbott, who had no title to them. The defendants, having received the cheques for collection on behalf of Abbott, presented them, and obtained the proceeds from the plaintiff's bank, and applied the same to the credit of Abbott's account. Abbott had no account at the National Provincial Bank, and was only in possession of the cheque-forms as manager for the plaintiff. When he had filled up the forms and signed them 'per pro. Bruce Morison and Co.' the plaintiff was the true owner of the instruments, and Abbott had no authority to dispose of the cheques for his own purposes, or to pay them into his own banking account. They came into existence as cheques on the plaintiff's banking account by the fraud of Abbott and were issued by him to the defendants in fraud of the plaintiff.

"The defendants collected the proceeds, and their right to retain the money so collected must depend upon the validity of Abbott's title to the cheques, and if such title was invalid, upon the protection of section 82 of the Bills of Exchange Act, 1882. In my judgment the defendants' title to such cheques was defective, as Abbott issued them to the defendants in fraud of the plaintiff. The defendants dealt with them in a manner inconsistent with the rights of the plaintiff, who was the true owner, and are liable to him for the conversion of his property. Damages for such conversion may be, and in my opinion are in this case, the face value of the instruments. The plaintiff is entitled to compensation for the loss he has suffered by reason of the conversion, and that loss is the equivalent of the amounts paid to the defendants by the National Provincial Bank and debited to the plaintiff's banking account.

"The defendants have wrongfully obtained money on valuable instruments of the plaintiff, and his banking account at the National Provincial Bank has been depleted to the amounts paid on the cheques. The plaintiff has lost the sums which the defendants have wrongfully received, and the plaintiff is therefore entitled to recover such sums as damages for the conversion.

That such damages may be given for the conversion of a cheque or bill of exchange has been decided in many cases. (See Bobbett *v.* Pinkett, L.R. 1 Ex.D., 368; Fine Arts Society *v.* Union Bank, 17 Q.B.D., 705; Kleinwort *v.* Comptoir National d'Escompte de Paris, [1894] 2 Q.B.D., 157; Bavins *v.* London and South Western Bank (Limited), [1900] 1 Q.B.D., 270; Capital and Counties Bank *v.* Gordon, [1903] A.C., 240; Macbeth *v.* North and South Wales Bank, [1908] 1 K.B.D., 13; affirmed in North and South Wales Bank *v.* Macbeth [1908], A.C., 137). The same result would be reached by the plaintiff upon the alternative claim for money had and received. . . .

"The plaintiff further contended that the signatures per procuration by Abbott to the cheques were forgeries, and that therefore the instruments were nullities and the defendants could not retain the proceeds obtained by means of forged instruments. In fact the signature was the genuine signature of Abbott in the form authorized by the plaintiff. The forgery was, as alleged by the plaintiff, in the misuse of his authority to sign cheques per procuration, as this amounted to the making of a bill per procuration without lawful authority or excuse and with intent to defraud, and it was contended that all the necessary elements of a statutory forgery under 24 and 25 Victoria, chapter 98, sec. 24, were thus present. I cannot accept this contention.

"If, as is admitted, the National Provincial Bank were entitled and indeed bound to honour cheques so signed, these were valid instruments for that purpose, and, if so, they cannot be forgeries in the hands of the defendants. The signature to a cheque cannot be a valid signature in the hands of one person and a forgery in the hands of another; it cannot be valid to-day and a forgery to-morrow, although in some circumstances, by the application of the doctrine of estoppel, a person whose money has been wrongfully obtained by a forgery might be precluded from setting it up. In my judgment the statute mentioned does not make it a forgery if a genuine signature is affixed by a person who indicates on the face of the document that he signs per procuration on behalf of another, notwithstanding that the authority so to sign has been misused and fraudulently used.

"The defendants set up a defence based upon the protection afforded by sec. 82 of the Bills of Exchange Act, 1882, to bankers who collect payment of cheques for their customers if the bankers have acted in good faith and without negligence. The defendants' good faith is not questioned, but it is contended that they did not act without negligence. Mr. Justice Coleridge, being of opinion that sec. 25 of the Bills of Exchange Act, 1882, must be read with sec. 82, came to the conclusion that the defendants were put upon inquiry by the mere fact that the cheques bore a signature per procuration, and that as the defen-

dants failed to make inquiry they cannot be held to have acted without negligence. I do not agree with this view of the effect of sec. 25. Section 82 only comes into operation when a banker receives payment of the proceeds for his customer, and therefore when the cheque has been honoured.

"The effect of sec. 25 is that, notwithstanding the negotiable character of the instrument and the obligations upon the signatory to such an instrument to holders, and more particularly to a holder in due course, and notwithstanding the authority given by the principal to the agent to sign negotiable instruments per procuration so as to bind the principal, the principal is not liable upon the instrument, even to a holder in due course, if the agent in so signing the cheque has exceeded the actual limits of his authority. The principal in such circumstances and before the instrument is honoured could refuse to pay the cheque or bill upon presentation, and would have a good defence to a claim, even when made by a holder in due course, upon the cheque or bill.

"I agree with Mr. Justice Coleridge that this section is declaratory of the common law. (See Stagg *v.* Elliott, 31 L.J., C.P., 260); but it does not, in my judgment, extend beyond it or alter it. When a bill so signed in excess of authority has been honoured sec. 25 does not confer a right to recover the proceeds. If such a right exists in the particular case it must be found elsewhere. Nevertheless, the fact that the signature to the cheques is made per procuration and is not the signature of the principal is not to be entirely disregarded. In my opinion, when considering whether the bank has acted without negligence, it is to be borne in mind with other facts and circumstances. It is also to be observed that Mr. Justice Coleridge did not rely exclusively upon his view of sec. 25 as bearing upon sec. 82; for in a later part of his judgment he refers to the payment in of these cheques by the agent at his private account at another bank as another circumstance which should have caused the bank to make inquiries. Whether or not the evidence establishes that the bank did not act without negligence is a question of fact, and in strictness should be determined separately with regard to each of the 50 cheques signed by Abbott.

"With reference to the earlier transactions, limited to the years 1907 and 1908, I agree with the decision of Mr. Justice Coleridge, that the defendants did not act without negligence. The proceeds of six cheques were collected in these two years for Abbott by the defendants. The first was an open or uncrossed cheque to which sec. 82 does not apply. The next three were drawn to 'selves or order,' and endorsed by Abbott per procuration. The other two were made payable to 'Abbott or order,' and were endorsed by Abbott. The defendants knew that Abbott was

manager to a firm of insurance brokers, and the signature on the cheques was express notice to them that he was purporting to act in the signing and endorsing of these cheques as agent. The most cursory examination would have shown the defendants that they were collecting payment for their customer of cheques drawn by him as agent upon the account of his principal at another bank, and that the first three of these crossed cheques were made payable on the face of the instruments to the principal or order and issued to the bank by means of the endorsement of the agent purporting to act for the principal.

"Different considerations apply, however, to the collection of the later cheques issued in 1909, 1910, and 1911. No question had been raised in reference to the cheques paid into Abbott's account in the preceding two years and any doubt or suspicion which the defendants ought to have had of these earlier transactions would have disappeared by this time.

"I cannot think that the defendants were guilty of negligence in not making inquiries with reference to these cheques after their experience of Abbott's transactions with them in the preceding two years. It is true that the plaintiff owed no duty to the defendants to examine his pass-books or check his accounts with them or with Abbott; but when we are asked to find as a fact that the defendants were negligent, it is necessary to consider all the circumstances, and in my judgment, as these transactions were only repetitions of those of the previous years which had passed unchallenged, the defendants should not be deprived of the protection of the statute."

His Lordship then dealt with the progressive increase in the amount of cheques paid in by Abbott, stating it to have been as follows: 1907, 2 cheques, £82; 1908, 4 cheques, £188 17s. 6d.; 1909, 9 cheques, £260; 1910, 12 cheques, £591 6s. 3d.; 1911, 23 cheques, £763, making a total of fifty cheques of the value of £1885 3s. 9d. He said "This yearly increase would not of itself arouse doubt or suspicion. Abbott's salary or commission or share of profits might easily have risen in amount, and as each year passed there would appear to be less and not more reason for inquiry." He then proceeded as follows. "In my judgment, therefore, the defendants are not liable to the plaintiff in this action in respect of the 43 crossed cheques during the three later years."

For the defendants it was contended that upon the facts proved, and even assuming that they had been negligent in not making inquiry, they were not liable in this action because the plaintiff had ratified the acts of Abbott. The main additional facts necessary for the determination of this point are as follows:— It was the practice of the plaintiff to have a yearly balance-sheet prepared and presented to him by his accountants. In 1908 it

was discovered that there was a considerable deficiency in the capital of the firm, and in August, 1908, Abbott admitted that he was responsible for it and explained that he had lost it by speculating in the name of the firm. The plaintiff was not satisfied with the explanation and thereupon determined to have a thorough investigation of the affairs of the firm by his accountants. His Lordship fully described the investigation made by the accountants and said that, as wrongful drawings by Abbott appeared upon the surface of the accounts, and must have been discovered by any accountants who did their duty, it must be assumed that they did discover these transactions and had knowledge of Abbott's wrongful dealing with these cheques. For the plaintiff it was contended that that assumption could not be made without imputing to the accountants that they were parties to Abbott's frauds. His Lordship did not agree with that contention, and did not come to any such conclusion; but in his opinion, although the plaintiff did not himself know that Abbott had been paying these moneys into his private account with the defendants, the persons to whom the plaintiff had entrusted the matter did know it. The plaintiff undoubtedly was aware, on September 30th, 1909, that Abbott had defrauded him by drawing cheques on the plaintiff's banking account and applying them to his own purposes. If the plaintiff did not know all the details of the dishonesty it was because he was content to leave them to the accountants. In consequence of the discovery of the dishonesty of Abbott a new agreement between the plaintiff and Abbott was drawn up dated November 16th, 1909.

His Lordship came to the conclusion upon the facts that the plaintiff must be held to have ratified some of the transactions of Abbott, and therefore that the plaintiff's claim in respect of the cheques for 1907 and 1908 and the uncrossed cheque for 1909 failed.

His Lordship, continuing, said that the principle in London and River Plate Bank *v.* Bank of Liverpool ([1896], 1 Q.B., 7), and not that in Holland *v.* Russell (4 B. and S., 14) covered the case. The addition of the words "not negotiable" and in some cases "not negotiable account payee" to some of the crossed cheques under consideration had, in his opinion, no bearing upon the matters to be decided. The protection of sec. 82 was afforded to crossed cheques marked "not negotiable" as well as to cheques not so marked. It was certainly not conclusive evidence of negligence against a banker who collected crossed cheques so marked—(see Gordon *v.* Capital and Counties Bank, [1902] 1 K.B., 275). Even if he assumed that the taking of a crossed cheque bearing these words would be some evidence of negligence, it could not affect his decision upon the later cheques, as the other considerations to which he had referred

would outweigh any value he could attribute to such evidence. The appeal should be allowed with costs, and judgment should be entered for the defendants with costs.

Lord Justice Buckley : " I am also of opinion that this appeal succeeds. As we are differing from the learned Judge from whom this appeal is brought, I add a few words of my own upon some of the points which have been argued before us.

" The authority which Morison gave to the National Provincial Bank of England on April 7th, 1888, was in general terms. There is no question but that, as between Morison and the National Provincial Bank of England, the cheques signed 'per pro.' by Abbott were effectual, and the bank were entitled and bound to pay them. Under these circumstances it is impossible to say that the instrument was not a cheque. As between Morison and the National Provincial Bank of England, it was a cheque and not a forged instrument. A document cannot be a forged instrument as between certain persons and not as between others. The decision in Rex *v.* Holden (28 The Times L.R., 173; [1912] 1 K.B., 483) does not, I think, apply. The instruments were Morison's cheques, and none the less because they were cheques drawn in fraud of Morison.

" The next question is whether Morison was the true owner of the cheques. If he was not, the defendants cannot be liable in conversion. If he was, then sec. 82 of the Bills of Exchange Act, 1882, applies, unless the words " true owner " in that section bear some meaning different from that which they bear when the subject under consideration is conversion. Having regard to what Lord Halsbury said in Great Western Railway Company *v.* London and County Banking Company, Limited (17 The Times L.R., 700; [1901] A.C., 414), it seems to me that I ought not to draw a distinction between the title to the cheque itself and the title to the money obtained or represented by it. In the case referred to, the cheque was one drawn by the appellants, the Great Western Railway Company. The bank were held liable to them for the amount of the cheque.[1]

" In Ogden *v.* Benas (L.R. 9, C.P., 513), the plaintiff was again the drawer, and he recovered upon the footing that the money paid was money of the plaintiff which the defendant had no right to receive, and that consequently the plaintiff was entitled to recover it back.

" Next, treating the plaintiff as true owner of the cheque within sec. 82, does sec. 25 apply to a case in which the instrument has served its purpose and the money has been paid under it? Can the principal then claim to recover the money

[1] It should be mentioned that the cheque in that case was crossed " not negotiable."

on the ground, in the words of sec. 25, that he is not bound by the signature because the agent was not acting within the limits of his authority? Counsel for the bank has argued, and I think his argument is sound, that sec. 25 is not addressed to that case. In any action brought upon the instrument, sec. 25 applies. But to such a case as the present it has no application. The section is found as one of a group of sections dealing with the capacity and authority of the parties as persons concurring in the instrument. It goes, I think, to the validity of the instrument as an instrument. It does not deal with the case of rights arising in respect of the disposition of the proceeds when the instrument has served its purpose and the amount has been paid. In considering, therefore, sec. 82 as a defence, I think sec. 25 may be set out of consideration.

"There remain those which are to my mind the important points of this case—namely, the questions, first, whether there was negligence; secondly, whether there was ratification; and, thirdly, whether Morison, with the knowledge which he had, can render the defendants liable for the loss which he sustained by continuing to employ a dishonest agent. For convenience I collect the main significant dates upon these points. The first agreement of employment was on November 2nd, 1900. Abbott's account with the defendants was opened in June, 1905, the first relevant cheque was on May 29th, 1907, £26. The second was on June 19th, 1907, £56. The balance-sheet of December 31st, 1907, disclosed the £5,929, of which £2,929 was debited to Abbott and £3,000 to goodwill. On August 12th, 1908, Morison wrote a letter of that date to the accountants from which it is plain that he knew that Abbott had lost money (as he said) in speculation. By that letter Morison urged that the losses should be proved by cheques which must, he said, have been drawn, and added that he ought to know that the money lost was actually lost in speculation and not used for any other purposes. The two cheques of £26 and £56 must, of course, have formed items in arriving at that balance-sheet. The balance-sheet further contained under the head of 'Sundries £3 1s. 9d.' that which was at December 31st, 1907, the balance of the exchange cheques account. The balance-sheet to December, 1907, was prepared subsequently to the date of that letter—namely, in September, 1908. These two cheques, as to which there must have existed in the possession of Morison at his office every means of knowledge, either were not traced, which was wrong, or were traced and the defendants were not informed of it, which was worse. On September 28th, 1909, Morison received the balance-sheet of the following year—namely, to December 31st, 1908. That brought forward as a debit to Abbott the £2,929 of the previous balance-sheet and further debited him with £306 0s. 4d., which was, on

December 31st, 1908, the debit of his private account in Morison's books. On September 30th, 1909, Morison wrote to the accountants about the deficit in Abbott's name, and the balance on the wrong side. On October 1st, 1909, the accountants sent him a copy of Abbott's private account as appearing in the firm's books from January 1st to December 31st, 1908, and from January 1st to May 22nd, 1909. Under these circumstances, Morison, with all this knowledge and means of knowledge, on November 16th, 1909, affirmed Abbott's engagement as his manager upon the terms stated in the letter of that date. The engagement was for the period of their joint lives and ten years after Morison's death during the remainder of Abbott's life, until determined by notice as there mentioned, with a stipulation that Abbott should not incur any liabilities without his previous sanction except in the ordinary business transactions of the firm, and should not bet, gamble, or speculate, either in his own name or that of the firm, or otherwise. The balance-sheet of December 31st, 1908, was thereby agreed as a basis of the accounts between the parties. Down to the end of 1908 the total of the funds misappropriated which it is sought to recover in this action was £270 17s. 6d. After the end of 1908 Abbott misappropriated a further sum of £1,614 6s. 3d., and for all these the plaintiff seeks to make the defendants liable.

" Quite shortly, it seems to me that, assuming as I do that when the cheques, say, in 1907, two in number, were dealt with by the defendants, there was enough to put them upon inquiry. The position after, say, the end of 1907, was such that any suspicion which they ought to have had would have been lulled to sleep by the action of Morison himself. Such a sufficient time had then elapsed during which the customer had received back his pass book and his cheques, and had raised no question as to the validity of the cheques as that the defendants were entitled to assume that there was no cause for suspicion or inquiry. As from that time, no negligence is to be imputed to the defendants because they did not inquire whether the cheques were justified or not. As regards the earlier cheques of a date before such time had elapsed, it seems to me that the plaintiff's action was such as to adopt and ratify Abbott's acts in the matter. The fact is, that after these proceedings Morison, whose fault or misfortune is that he has employed a dishonest agent, is seeking to throw the consequences of his dishonesty upon the persons who are not in any way responsible for that dishonesty, persons who dealt with the cheques in the ordinary course of business and, as is admitted, in perfect good faith. The principle of Cocks *v.* Masterman (9 B. and C., p. 902), and of London and River Plate Bank *v.* Bank of Liverpool (*ante*), is, I think, applicable. The principle is larger than that in Holland *v.* Russell (*ante*). It is, I think, the case that

the bank are not here to be treated simply as agents who paid money to Abbott as their principal before the bank received notice not to pay it. The money here has been received by the defendants in good faith and paid to their customer, Abbott, in good faith. Since its receipt they have altogether altered their position in that they have in good faith paid the money away to Abbott. Under these circumstances, I think the principle of Cocks *v.* Masterman (*ante*) applies, and that the defendants cannot be rendered liable for it to Morison. On these grounds I think this appeal succeeds."

Lord Justice Phillimore :—" The plaintiff, in my judgment, has made out a *primâ facie* case for recovering in trover against the defendant bank for the conversion of his cheques and to obtain as damages the face value of the cheques. I say his cheques, and I make out his right in the following manner :—

" The cheques as originally drawn were instruments whereby the plaintiff, or a person to whom the plaintiff was bound, or desired, to pay money, could obtain out of the moneys standing to the plaintiff's credit with his bank the sum specified on the face of the cheque. The cheques were the plaintiff's instruments till he chose—or till Abbott on his behalf chose—to issue them to some outside person.

" As regards two of the cheques, which were open ones and drawn to ' bearer,' they need never have been further issued than by presenting them to the plaintiff's bank and getting them cashed. As regards the others, no doubt it was in contemplation that they should be issued to the extent of passing through another bank, because they were crossed. And one cheque would require further negotiation, because it was drawn to the order of somebody outside, to wit, the defendant bank. But all of them, till issued, remained the plaintiff's property. Till Abbott took them to the defendant bank they had not been issued. In Abbott's hands they were still his employer's property and Abbott could not, and did not, give to the defendant bank any title in them. Therefore, they were plaintiff's cheques at the time when they came into the possession of the defendant bank. The defendant bank, as the collecting bank, presented them to the plaintiff's bank and collected the proceeds, and did not do this as a bare messenger. The defendant bank was the holder of the cheques which, with the exception of the one of which I have already spoken, were, by the time they reached it, bearer cheques, and it collected the proceeds in its own right, probably settled for them in account with the paying bank, very likely through the Clearing House, and gave its receipt. Therefore, the defendant bank converted the cheques. That the damages for such conversion are (at any rate, where the drawer has sufficient funds to

his credit and the drawee bank is solvent) the face value of the cheques is established in a series of cases, such as Bobbett *v.* Pinkett (*ante*), Fine Art Society *v.* Union Bank (*ante*), Bavins *v.* London and South-Western Bank (*ante*), and Macbeth *v.* North and South Wales Bank (*ante*), and is so well established that it is not necessary to inquire into the principle which may underlie the authority. But the principle probably is that, though the plaintiff might at any moment destroy the cheques while they remained in his possession, they are potential instruments whereby the sums they represent may be drawn from his bankers, and if they get into any other hands than his, he will be the loser to the extent of the sums which they represent. It may be also that anyone who has obtained its value by presenting a cheque is estopped from asserting that it has only a nominal value.

" Having got so far as determining that the plaintiff has made out a *primâ facie* case, I have now to consider the several defences raised by the defendant bank. But before I enter upon these, there is a preliminary point raised by the plaintiff which, if established, would destroy or seriously affect several of these defences. He contends that these cheques are forgeries—statutory forgeries, as one of his counsel put it. Apart from the Statute, which I will consider in a minute, this contention cannot be supported. These cheques are real documents, which, when they reach their destination, will be honoured and properly honoured by the plaintiff's bank. They have been created for an improper purpose and in fraud of the plaintiff, but they have been created by a person whom the plaintiff had put in his place to create them. How, as was observed in the course of the case, they can be no forgeries when they reach their destination and yet be treated as forgeries while in the hands of other parties during the course of their journey, I fail to see. But it is said that the Statute 24 and 25 Victoria, chapter 98, sec. 24, makes it forgery to sign with intent to defraud any bill of exchange, by procuration or otherwise, for or in the name of or on the account of any other person without lawful authority or excuse, and that this enactment covers the case where a man having authority to sign uses his authority for an improper and fraudulent purpose to the detriment of his principal. This again, I think, is an error. The reason why the words " by procuration or otherwise," were inserted in this statute is well known. It was always forgery to counterfeit a man's signature to certain important documents, unless indeed you had the man's authority to write his name for him; but it was a different thing to append a man's signature with a statement showing that you were not claiming that it was his hand, but that you signed for him under a supposed power. The point seems to have been mooted in one or two cases, and it was finally decided in White's case, 1 Denison's Crown Cases, p. 208 [1847] not to

be a forgery under the law as it then stood, the argument which prevailed being thus summarised by Counsel for the prisoner. 'The prisoner has counterfeited nothing; the writing is not made as the writing of another, but avowedly as that of the prisoner himself; and though he may have committed fraud in saying that he was authorised to make the endorsement, that is not a forgery, but a mere false pretence' (p. 212). In White's case, the prisoner, though at one time a clerk of the man in whose name he signed, had not, and never had, authority to sign for him. To meet this, the section I have quoted was passed. And it has no further application. It does not extend the law to cases where a man having authority to sign the name of another 'per pro.' misuses his authority, just as, I think, under the old law, if a man had authority to sign the name of another and misused that authority he would not be indictable for forgery.

"I have not, in stating these various propositions, added the phrase 'with intent to defraud' which is always an ingredient in the charge of the crime. The words are used to meet the possible though rare case of an innocent forgery; for example, for a wager, or for a joke, as suggested by Mr. Justice Walton in Rex *v.* Muirhead (25 The Times L.R., 88; 1 Cr. Ap. R., 189), where the analogous subject of false pretences was being discussed. I merely say this to guard my propositions. Rex *v.* Holden (*ante*) does not decide anything to the contrary of what I have said. There are partnerships which, from the nature of their business, imply an authority in each partner to sign the firm's name to bills, etc. There are others where no such authority is to be implied, and unless it is given in express terms the partner has not got it. Mr. Justice Avory stated for the purposes of the point on which the opinion of the Court was to be taken that the prisoner had no authority, meaning, I take it, no general authority as partner, and then, to stop a possible hole, took the opinion of the jury as to whether or not a particular authority had been given to him. That there was no suggestion that the prisoner had such general authority as partner, or under the partnership articles, appears from the argument of his counsel. They take no such point, but rely upon the general right of a partner to trade in the firm's name, and refer to Banks *v.* Gibson (34 Bevan, 566) and decisions in Chancery to that effect. The Lord Chief Justice has sent for all the papers in the case and a perusal of them confirms this view of the case. The Court, therefore, in Rex *v.* Holden (*ante*) only decided that the prisoner, having no authority to sign the name of his firm to bills, could not ride off on the fact that his firm's name was a partnership asset. It comes back to the same principle. Where there is power to sign 'per pro.,' a document so signed is not a forgery to the party to whom it is addressed, and who can or *a fortiori* must act upon it, and

therefore is not a forgery at all. The misuse by an agent of his power of writing his principal's name either as a simple signature or by signing 'per pro.' may, however, be indictable as some form of fraud.

"I now come to the defences; and the first defence raised is under sec. 82 of the Bills of Exchange Act, 1882, which protects the bank which collects a crossed cheque and receives payment for its customer in good faith and without negligence from incurring a liability to the true owner of the cheque. As the plaintiff sues as owner, and as these cheques are not forgeries, the section applies. The good faith of the defendant bank is not questioned. The point left for decision is whether it has received payment for its customer Abbott without negligence.

"The learned Judge has held that there was negligence. In the appropriate part of his judgment he seems to have rested that negligence on one ground only; namely, that the collecting bank, seeing that the signature was 'per pro.,' had thereby notice, under sec. 25 of the Act, that the agent had but a limited authority to sign, and was therefore bound at its peril to make due inquiries as to the extent of the authority, and that it made none. A conclusion so sweeping would make cheques signed 'per pro.' and crossed either useless or mere incentives to gambling. I think the true answer is that sec. 25 is without relevancy to sec. 82. Under sec. 25, he who takes a negotiable instrument signed 'per pro.' has notice that he may, when he comes to present it for payment, or when someone else to whom he has negotiated it presents it for payment, find that he or his transferee may fail to get payment because the limited authority of the agent may have been exceeded. It is a question of infirmity of title, but when once the instrument has been discharged by payment, neither the presenter nor his predecessors or successors in title are put under a liability to repay because he or they had originally notice that they might not get their money. If it were otherwise, there would be two objections to the point as a point in favour of the plaintiff:—1. That the only person who could avail himself of the right to recover would be the man who discharged the instrument—that is, the plaintiff's bank, not the plaintiff. 2. That if the plaintiff's bank sought to do it, the special rule as to prompt recovery of the money wrongly paid to discharge a negotiable instrument laid down in such cases as London and River Plate Bank *v.* Bank of Liverpool (*ante*) and Imperial Bank of Canada *v.* Bank of Hamilton (19 The Times L.R., 56; [1903] A.C., 49) would apply. I should here perhaps add that the cases cited in the judgment of the learned Judge as authority for the duty of the collecting bank to inquire when it deals with cheques with 'per pro.' signatures are cases of cheques not drawn for the principal by the dishonest agent signing 'per pro.,' but cases of cheques in

favour of the principal endorsed by the agent 'per pro.,' and then paid by him into his own account, a most suspicious proceeding. But though in the appropriate part of his judgment the learned Judge has apparently relied upon the bare fact of the signature being 'per pro.' as sufficient to make the collecting bank negligent for non-inquiry, he has in another part of his judgment taken another fact into consideration, a fact which, we are told by counsel, he mentioned as impressing him during the course of the trial; and I think we must take this fact into consideration, as it certainly arises upon the evidence.

"Abbott was a customer of the collecting bank, well recommended, no doubt, but known to be an employee and a manager; and, being a manager and having the power of signing 'per pro.' for his employer, he was placing cheques which he drew for his employer to his private account. If this happened often enough, and with regard to sufficiently large sums, I think it ought to give rise to some suspicion in the breast of the bank manager or the cashier. If it were material, I do not think that I should be prepared to dissent from the conclusion to which, I think, the learned Judge intended to arrive, that there was negligence in cashing some of the earlier cheques, cashing them and paying them to Abbott's account without, at least, some inquiry. But as regards all the middle and later cheques, a suspicion which might have been reasonably entertained would with at least equal reason be lulled to sleep. No business man need anticipate that a series of cheques ranging over more than a twelve-month, for appreciable sums, occasionally large ones, would pass unnoticed if they had been improperly drawn by an employee. The plaintiff may be under no duty to the defendant bank to examine his pass-book, or check his accounts, or have them vouchered or examined; but the defendant bank was entitled to act as a reasonable man of business would, and to assume that, duty or not, the employer would in no very great length of time discover that he was being robbed in a mode so easily capable of detection. While inclining, therefore, against the collecting bank as to the few earlier cheques, I decide as far as I am concerned that the collecting bank without negligence collected and recovered payment for Abbott of the bulk of the crossed cheques which are the subject matter of this action.

"I am not impressed by the points made as to special cheques which were drawn to London County and Westminster Bank or bearer, and crossed generally, with the addition of the words 'not negotiable, account payee,' or as to the one cheque which was drawn to defendant bank or order, the cheque forms used being forms with the word 'Order' printed, and in the one case the word 'Bearer' not having been substituted. On the assumption that Abbott was justified in paying these cheques to his account,

there was nothing objectionable in his bank being the nominal payee; and in the order case the endorsement by the bank would be merely what is called 'the necessary dealing with the instrument'—in the language of Sir R. Henn Collins, Master of the Rolls, in Gordon *v.* London City and Midland Bank (*ante*). There are two cheques not crossed. As to these the defence of sec. 82 does not apply, and the defendant bank is driven back upon its next line of defence, which, if sound, covers them and the earlier crossed cheques, as to which there may have been negligence, and the later cheques to the end of 1908. It is the defence that the plaintiff ratified the drawing and cashing of these dishonest but genuine cheques. As to this defence, counsel for the plaintiff made two answers. They deny that in fact there was ratification, and they say, and truly say, as the learned Judge in the Court below has said, that there can be no ratification without knowledge of what you are ratifying, and they contend that the plaintiff had no knowledge.

"On the first point, some time in the year 1908, when the balance-sheet for 1907 was being prepared by the accountant, it appeared that Abbott was short of a sum of £5,929 odd, for which he gave no account. The plaintiff said he put the matter wholly in the hands of his accountant, and that he only knew generally from the accountant that this was so and that Abbott gave some excuse as to unfortunate speculations in the name and on behalf of the plaintiff. The accountant was not called as a witness. In the result, after conference between the plaintiff and the accountant, the shortage was treated in this way: £3,000 was debited to goodwill, and for the balance Abbott was treated as a debtor, the item being carried into the balance-sheet as a debt due from Abbott, with some understanding that Abbott was to replace it at some undefined time or times, being warned not to do such a thing again. In 1909 there was a similar shortage of £306 on the balance-sheet of 1908, and it was carried into the balance-sheet as a debt of Abbott's. The amounts collected by the cheques in suit in 1907 and 1908 form part of or contribute to Abbott's deficiencies. As the figures show, they were by no means all. The deficiencies in each year were treated in the lump and debited and dealt with in the way I have mentioned. In my view there was ratification of those acts of Abbott's which depleted the plaintiff's banking account by the use of the cheques in question, as well as of other acts of Abbott which must have swelled the depletion. The plaintiff's remedy against Abbott for his misappropriation was abandoned; as to part without any *quid pro quo*, except the continuance of Abbott's services; as to the rest by converting him into an ordinary debtor with certain terms as to repayment, and this, I think, makes ratification. As to knowledge, it is unnecessary to decide what

inference should be drawn when a principal knows so much that it is a policy of an ostrich to know no more. I am not sure that in that case we can altogether rely upon the doctrine that for this purpose means of knowledge are not the same as knowledge. It is unnecessary to decide this; for here the plaintiff put the accountant in his place, and we really cannot believe that the accountant did not know that Abbott had been passing 'per pro.' cheques to his private account. Each cheque so passed would bear the stamp of the collecting bank and would either, according to modern practice, be returned by the paying bank to the customer, or would be available at any moment if the customer or his accountant demanded it. Ratification, therefore, covers a gap in the defences *quoad* the uncrossed cheques and any of the early cheques, as to which there may have been negligence. It is not wanted for the later crossed cheques, and on the whole the defendant bank succeeds. I have not thought it necessary to determine upon the defence of estoppel by negligence, which involves considerations of some difficulty.

" I have only to add that two further defences raised for the defendant bank by counsel's speech in reply before us do not seem to me to help it.

" The doctrine with regard to prompt notice and demand where a negotiable instrument has been discharged in error only applies, as I have already incidentally said, where it is the payer of the instrument who seeks to recover back. And the doctrine that an agent who has in good faith paid to his principal money to which it is subsequently discovered the principal had no right cannot be required to return money which he has so paid over only applies where the action is for money had and received to the plaintiff's use, an action which assumes that there was no wrongful act in receiving the money. In such a case the plaintiff's licence to receive the money is presumed; and therefore the plaintiff cannot complain if it is properly paid over before the licence is revoked.

" In the present case, the plaintiff, though he has in the alternative shaped his case as for money had and received, has a right to sue in trover for the conversion of his cheques, and accordingly would not be defeated by the fact that the defendant whom he sues for misuse of his temporary dominion of the property claims to be an agent for someone else.

" I agree that the appeal must be allowed."

Appeal allowed.

*Note.*—The above is one of the most important banking cases decided in recent years, particularly on account of the number of points involved and adjudicated on therein. With regard to most of these the decision is favourable to the banker.

Subject to any possible future decision of the House of Lords, the following propositions may now be taken as established.

1. That the face value of a cheque is the normal measure of the damages for its conversion. This, however, was pretty well settled by the previous cases cited in the judgments.

2. That where a subordinate has authority to draw cheques for certain purposes, and, in abuse of that power, draws and uses them for his own ends, thereby obtaining money of his employer's, that employer remains the owner of the cheque forms and the completed cheques, and can maintain conversion in respect of them.

There may have been some doubt on this point previously; but this case disposes of it. As Lord Reading says :—" The cheques were at all times, till issued, the property of the plaintiff. They never were the property of Abbott, who had no title to them—Abbott was only in possession of the cheque-forms as manager for the plaintiff. When he filled up the forms and signed them 'per pro. Bruce Morison and Co.' the plaintiff was the true owner of the instruments."

Phillimore, L.J., says :—" In Abbott's hands they were still his employer's property, and Abbott could not and did not give to the defendant bank any title in them. Therefore, they were the plaintiff's cheques when they came into the possession of the defendant bank."

The underlying principle is that an agent cannot, by misusing his authority, make his master's property his own, and that if, by a partly authorized act, he enhances the value of that property, it still remains the master's.

3. The unauthorized and fraudulent use of an authorized signature is not a forgery. A signature cannot be a forgery for one purpose, at one time, or in one person's hands and genuine for another purpose, at another time, or in another person's hands.

This is logically and conclusively demonstrated by the judgments.

It is true that the rule was laid down with immediate reference to sec. 24 of the Forgery Act, 1861, *cf.* existing Forgery Act, 1913, sec. 1. But the wording of sec. 24 of the Bills of Exchange Act is obviously open to the same construction, and the principle laid down above is accordingly treated as applicable to that section by Sir Mackenzie Chalmers, "Digest of the Law of Bills of Exchange," 8th ed., p. 85. This opens up interesting questions and lines of defence in cases where subordinates have abused their authority with regard to bills and cheques.

4.—The operation of sec. 25 as to signatures by procuration is confined to the time during which the bill or cheque is current.

It only affects persons taking the instrument by way of negotiation. Once the instrument is paid, no claim for return of the money can be founded on this section. It has no bearing on sec. 82, save that disregard of a per pro. signature may go to show negligence. This is somewhat of a new departure. The conclusion is probably based on the wording of sec. 25: "The principal is *only bound by* such signature if the agent in so signing was acting within the actual limits of his authority." On the other hand, the money was recovered on the ground of notice by signature "per pro." in Gompertz *v.* Cook, 20 Times L.R., p. 106, and in Morison *v.* Kemp, 29 Times L.R., p. 70, *ante*, p. 41, both, however, being decisions of single judges, and not in relation to collecting bankers.

5. The case also turns the scale in favour of the decision of Mathew, J., in London and River Plate Bank *v.* Bank of Liverpool, [1896] Q.B., 7, as against that of the Privy Council in Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A.C., 49, and affirms the proposition that money paid on a negotiable instrument to an innocent person cannot be recovered if the position of that person may meanwhile have been altered, independent of any question of giving notice of dishonour.

It is further noticeable that this case extends the benefit of this doctrine to the collecting banker, apart from any question of his acting as agent.

6.—There could be no immediate question of the pass-book in this case between the parties. The plaintiff's bank was the National Provincial, not the defendant bank; but, indirectly, the pass-book was accorded a certain significance as a factor countervailing the *primâ facie* negligence of the collecting bank, the Court holding that the defendant bank were entitled, among other considerations, to assume that the plaintiff, through his pass-book, must in course of time have discovered any irregularity in Abbott's dealings with the account. This process of looking at all the circumstances in order to decide on which side the balance of negligence lies is somewhat novel in bank cases. It is analogous to the doctrine of contributory negligence in accident cases, and may be useful in future actions turning on sec. 82.

7.—A great deal turned on adoption of the cheques in this case, but the long-suffering attitude of the plaintiff towards Abbott, the financial arrangements come to with him on discovery of his malversations, were so exceptional, that the decision is of little value for general purposes.

8.—Lord Reading's careful investigation of the progressive amount of the cheques paid in by Abbott and his remarks thereon have considerable bearing on the disputed question how far a

banker should be influenced by fluctuations or rapid rises in a credit account. Lord Reading's conclusion in this particular case seems a reasonable one: the same can hardly be said of that of the Privy Council in Commissioners of Taxation *v.* English and Scottish Bank, 36 Times L.R., 305, *post*, p. 220. There an account was opened with £20, and the next day a cheque for £786 18s. 3d. payable to bearer was paid in, the cheque in question in the action. The Privy Council saw nothing in this to excite suspicion or induce inquiry.

9.—Lord Reading's guarded statement that it was not conclusive evidence of negligence against a banker that he had collected a cheque crossed "not negotiable" for a person other than the payee, is to be regretted, as keeping open a discussion which should have been closed long ago.

[IN THE COURT OF APPEAL.]

## ROBERTS *v.* MARSH.

Reported. [1915] 1 K.B. 42. 30 Times L.R. 609. Journal, Vol. XXXV, p. 554.

### *Cheque or Conditional Order to Pay?*

The defendant appealed from the judgment of Mr. Justice Avory, at the trial of an action without a jury, reported 30 The Times Law Reports, 14. The plaintiffs, Messrs. C. L. Robert and Co., sued the defendant, Mr. Thomas Marsh, on a dishonoured cheque. The plaintiffs had entered into a contract with the defendant in connection with a scheme for the purchase of certain collieries and brickfields at Dudley, and under this contract the defendant was to pay the plaintiffs £100. At the time of signing the contract the defendant offered a bill for the amount, but the plaintiffs insisted on having a cheque. The defendant had not his cheque-book with him, but the plaintiffs supplied him with a blank form of cheque, which he filled in and signed. He said that he did not wish a cheque in that form to pass through his bank, and stipulated that it should be held back, and wrote the words " to be retained " on the face of the cheque, and promised to send a cheque on one of his banker's printed forms in substitution for it. This he failed to do; the original cheque was, therefore, presented, and on its being dishonoured this action was brought.

It was contended on the part of the defendant that the words " to be retained," written on the face of the document, prevented it from being an unconditional order to pay within the definition of a cheque in sec. 73 of the Bills of Exchange Act, 1882; and further that the plaintiff's own evidence showed that this cheque was never intended to be presented.

Mr. Justice Avory held that the plaintiffs were entitled to recover, and gave judgment accordingly.

The defendant appealed.

The Court dismissed the appeal without calling upon counsel for the plaintiffs.

Lord Justice Buckley, after stating the facts, said that it had been contended that this was not an unconditional order to pay by reason of the words " to be retained " on the face of the cheque, which imported a condition, but he did not think that was the

law. The condition must be looked at to see whether it was one which bound the banker or whether it was a condition only as between drawer and payee to retain the cheque, whatever that might mean. He thought it was the latter and that as regards the banker the order to pay was unconditional. The only authority which had been referred to was Nathan *v.* Ogdens, Limited, 21 The Times Law Reports, 775; 93 L.T., 553, a decision of Mr. Justice A. T. Lawrence, which had been affirmed in the Court of Appeal in 94 L.T., 126. The point in that case was that a cheque had been drawn for a distributive share of a customer in a certain fund. The cheque was sent with a covering letter which described the cheque as being "your share of the second and final bonus distribution of Ogdens, Limited, for the quarter ending September 30th last, at which date the company ceased to carry on business." At the foot of the cheque were printed the words, "the receipt at the back hereof must be signed, which signature will be taken as an indorsement of the cheque," and on the back was printed "Received from....., the liquidator of Ogdens, Limited, this cheque for £....., being my share of the second and final bonus distribution of the company." Was that instruction effective? The condition imposed was that there would be no payment unless the receipt was first signed, but it was only a condition as between drawer and payee. It was not addressed to the bankers, and it did not affect the nature of the order to them, which was an unconditional order to pay. In his opinion that decision applied to the facts of the present case, and was conclusive of the case. As regards the merits of the case, he thought there was no defence. In his opinion the judgment of Mr. Justice Avory was quite right and the appeal therefore failed.

Lord Justice Kennedy and Lord Justice Phillimore delivered judgment to the same effect.

*Note.*—The words "to be retained" were, as the Court held, clearly addressed to the payee, not to the banker. In the Law Reports "drawee" should read "payee," see *errata* at beginning of the volume.

With regard to Nathan *v.* Ogdens, the authority on which the case was decided, it may well be that in that case the condition, including the statement that the signature of the receipt could be taken as an endorsement of the cheque, was addressed to the payee and effective only as between him and the drawer, but it is more than doubtful whether either a paying or collecting banker could claim statutory protection on the basis of such signature of a receipt being an endorsement within the definition of the Bills of Exchange Act. Nathan *v.* Ogdens is no sufficient authority for such proposition.

[IN THE KING'S BENCH DIVISION.]

## HAARBLEICHER AND SCHUMANN *v.* BAERSELMAN.

From The Times, October 14th, 1914. Journal, Vol. XXXV, p. 631.

### *An Alien Enemy's Endorsement.*

THE plaintiffs brought this action to recover £1,001 16s. 2d., alleged to be due on a bill of exchange made payable to the order of Reuben Elias Reuben and endorsed by him to the plaintiffs, payable one month after date, July 20th, 1914. The bill was duly presented for payment and dishonoured, and reacceptance was expressly refused under the Postponement of Payment Act, 1914, and the proclamation thereunder. The plaintiffs said that they were holders in due course.

The plaintiffs, a firm of bill dealers and brokers, said that they were endorsees and holders for value of the bill. They had carried on business in the City of London for the past 60 years. The members of the firm were all British-born subjects. The defendants, Messrs. Baerselman Brothers, were a firm of provision importers who did a considerable business with Russia. The course of business between the plaintiffs and Reuben, who was a banker at Hamburg, was that the latter advised the plaintiffs from Hamburg that he was sending bills for discount, and these bills were purchased by the plaintiffs. The amount of the face value of such bills would be entered in the plaintiffs' books, less discount. The bills then became the property of the plaintiffs, who sold them or otherwise disposed of them. The bill in the present case was deposited with a firm called Robinson, Fleming and Co., as security for a loan, and was afterwards sold to the Bank of England, by whom it was presented for payment. The bill was dishonoured and returned to the plaintiffs as being unpaid.

The bill was drawn on July 20th for £1,000 at one month. On the same day the drawers wrote to the defendants informing them that they had drawn the bill, and had passed it through their banker, Mr. Reuben, who would present it for their acceptance. On July 22nd Reuben endorsed the bill to the plaintiffs, and on the same day Reuben wrote to the plaintiffs from Hamburg enclosing the bill and asking them to credit him with the amount of it. On July 24th the plaintiffs sent the bill to the defendants

and it was duly accepted by them. The defendants ultimately justified their action in dishonouring the bill on the ground that they could not pay drafts collected on account of belligerents. The case for the defendants rested upon the terms of the endorsement by Reuben, which was expressed to be "für mich," and in the case of "Haarbleicher and another *v.* Baerselman," tried before his Lordship on September 17th (see The Times, September 18th, 1914, and Journal of the Institute of Bankers for October, 1914, p. 555), it was contended and held that such an endorsement was restrictive, and therefore did not give to the plaintiffs any greater right in respect of the bill than Reuben himself had, and as Reuben was now an alien enemy he had at present no right to sue upon the bill. In the present case evidence would be given to show that, according to German law, that form of endorsement did not operate to restrict the right of an endorsee who, in fact, acquired an entire property in the bill. It was, in fact, the usual form of open endorsement in Germany.

Evidence was given by Sir Felix Schuster and other witnesses in support of counsel's opening statement.

On behalf of the defendants it was said that the distinction between the present case and that tried by his Lordship on September 17th was that the first case was dealt with as if it depended simply upon English law, according to which the endorsement was restrictive. It was now said that the endorsement was in Germany, and that under sec. 72 of the bills of Exchange Act, 1882, the interpretation of the terms of the endorsement was determinable by the law of the country where the contract was made. It was contended that the endorsement took place after delivery of the bill in England.

In reply it was said that all the witnesses agreed that the words *für mich* meant "instead of me," and the property in the bill was transferred by endorsement.

Mr. Justice Sankey, in giving judgment, said that in the case tried by him on September 17th, the facts were agreed, and on that occasion it was contended that the words *für mich* meant "for my use," and, that being so, the words came within the English decision of Sigourney *v.* Lloyd (8 B. and C.), 622. In Mr. Chalmers's book on the Bills of Exchange Act, 1882, under sec. 35, and the illustrations given therein of restrictive endorsements, illustration 1 said:—"Pay D. or order for my use." He could say without hesitation that if he had had in the former case the evidence which had been called in the present case he would have come to the opposite conclusion. There had been a considerable volume of evidence all on one side. The defendant was not able to produce any evidence to the contrary effect. His

Lordship had had the advantage of hearing the evidence of a number of eminent gentlemen on endorsements in those terms to the effect that such endorsements were universally treated as passing the property in the bills to the endorsees absolutely, and German text-books of authority were also produced which expressed the same view. Defendant's counsel had objected to the evidence on the ground that the witnesses were not in a position to know German law, but his Lordship's view was that foreign law was a question of fact, and the objection was only relevant with regard to the weight of such evidence. For these reasons there would be judgment for the plaintiffs, with costs.

[IN THE KING'S BENCH DIVISION.]

## WETHERMAN *v.* LONDON AND LIVERPOOL BANK OF COMMERCE.

31 Times L.R. 20. Journal, Vol. XXXVI, p. 4.

*Bankers as Bailees.*

The plaintiff, a British subject, wished to transfer 100 Union Pacific Railroad Shares to New York. The transfer was to be carried through by a bank in Berlin. At the direction of the latter, the plaintiff, on the 15th June last, instructed his London bankers to hand over the shares to the defendants "to the order of" the Berlin bank, who, at the same time, wrote to the defendants "you will receive free of value, 100 Union Pacific Shares, which please add to our depot," but no instructions were given to carry through the transfer. The result was that, when war broke out, the shares were still in the defendants' possession, and on finding this out the plaintiff claimed their return. To this the defendants replied that as they had received the shares on account of the Berlin bank they could only deal with them on that bank's instructions. The learned judge held, however, that this was not a sufficient answer, and ordered the defendants to hand over the shares to the plaintiff. He found, as a question of fact, that the Berlin bank had no lien on the shares, and only a right to forward them. The plaintiff could claim as against that bank to have them re-delivered to him, and the position of the defendants was no different. Undoubtedly the relation between these two banks was that of bailor and bailee respectively, and since the bailors, the Berlin bank, had no title to the shares, the bailees, the defendants, had none, because a bailee can never be in a better position than the bailor. The plaintiff was the true owner, and as such was entitled to claim the shares from anybody in whose hands they could be found.

*Note.*—In this case, heard in 1914, it does not appear to have been any part of the plaintiff's claim that the position was affected by the state of war.

The bank were acting in accordance with the usual practice in banking business in declining to return the shares to the plaintiff on the ground that by his direction they held them to the order of the Berlin bank.

It is true that the defendant bank were in the position of bailees for the Berlin bank, but they had in no way attorned to the latter or pledged themselves to them.

That position arose only from the direction and deposit of the plaintiff, and the judge held that these could be revoked in the absence of rights acquired by third parties. Or the judgment might be supported on the ground that the defendant bank were the agents of the plaintiff in the matter, and that an agent's authority is determinable by the principal so long as the agent is not prejudiced thereby.

[IN THE COURT OF SESSION, SECOND DIVISION.]

## MACKINNON'S TRUSTEES *v.* BANK OF SCOTLAND.

Abridged from the Scots Law Times, February 27th, 1915. Journal, Vol. XXXVI, p. 263.

*Payment of Guarantee before Bank's proof in bankruptcy of the Principal Debtor.*

On October 1st, 1913, decree of *cessio* was granted of the estates of Archibald Mackinnon, and H. Hume M'Gregor, S.S.C., was appointed trustee. Among the creditors claiming on the estate was the Bank of Scotland, whose debt was sworn at £3,863 16s. 7d. The trustee allowed the claim only to the extent of £1,057 1s. 10d. Against this determination the bank appealed to the Sheriff-Substitute.

Proof was allowed and led. It appeared that on August 19th, 1907, Louis Zollner, shipowner, Newcastle-on-Tyne, granted to the Bank of Scotland a letter of guarantee, in which he guaranteed "due payment of all sums for which" Archibald Mackinnon was, or might become, liable to the bank, the amount which he was to be bound to pay "not to exceed £2,500 sterling and interest from the date or dates of advance." Against the obligation undertaken by this letter the guarantor, on March 26th, 1912, handed to the bank the sum of £2,806 14s. 9d. which was placed in a separate account in name of the agent of the bank at Leith. On that sum being handed to the bank, the bank delivered up the letter of guarantee to the guarantor with a receipt in the following terms engrossed thereon:

"26th March, 1912.—We acknowledge to have received from the within-named and designed Louis Zollner the principal sum of two thousand five hundred pounds, with interest to date amounting to three hundred and six pounds, fourteen shillings and ninepence, due by him under the within guarantee. The payment is accepted under reservation of, and without prejudice to, our right to claim on the estate of the within Archibald Mackinnon for the full amount of his indebtedness to us.

"*For* the Bank of Scotland,
"A. Fraser, *Agent.*"

On receiving the letter of guarantee the guarantor destroyed it. At the date of the *cessio* Archibald Mackinnon was due to the

bank the sum of £3,863 16s. 7d., and the bank claimed for that sum without making any deduction in respect of the sum handed to them under the letter of guarantee.

On July 29th, 1914, the Sheriff-Substitute (Dods) admitted the bank to an ordinary ranking for £3,863 16s. 7d. The trustee appealed to the Sheriff.

On October 21st, 1914, the Sheriff (Maconochie) adhered to the interlocutor of the Sheriff-Substitute. The trustee then appealed to the Court of Session.

Lord Salvesen : " This appeal raises some questions of general interest in the law of ranking on a bankrupt estate. The Bank of Scotland were creditors of Archibald Mackinnon, ship and tug owner in Leith ; and they claim to rank for a sum of £3,863 16s. 7d., being the amount brought out in a state of debt. No controversy arises as to the items in this state ; but there was a note appended to it to the effect that the bank held on current account in name of their agent the sum of £2,806 14s. 9d. ' for the obligations of the said Archibald Mackinnon, being the amount of principal and interest received on 26th March, 1912, from Louis Zollner, merchant and shipowner, Newcastle-on-Tyne, under his letter of guarantee for £2,500 dated 19th August, 1907,' in favour of the said bank. Decree of *cessio* was pronounced against Mr. Mackinnon on October 1st, 1913, so that this payment had been made more than eighteen months prior to the date. The trustee in his deliverance ranked the bank for the amount of their claim less the sum mentioned in the note ; but the Sheriffs have both held that he was wrong in doing so, and that the bank is entitled to a ranking for the full amount.

" It turns out that the guarantee was precisely in the terms of that which came under the notice of the Court in Harvie's Trs. (12 R. 1141), and was a guarantee, not for part of Mackinnon's indebtedness to the bank, but for payment of all sums for which he might become liable to them, the amount not to exceed £2,500 and interest. Now, under such a guarantee it was held that the guarantor was not entitled to interfere with the bank operating payment of its debt by a ranking for the entire amount. There is, however, this essential difference between the two cases, that the sum paid by the guarantor in Harvie's case was not paid until after sequestration had taken place. The position accordingly was that the debtor was due the full sum to the bank at the date of sequestration, and that nothing had in fact been paid by the guarantor at that time. The bank was therefore not bound to deduct in ranking on the bankriupt's estate the claim which it had under the letter of guarantee. Neither of the Sheriffs, however, seems to have adverted to the distinction between the facts of this case and those of Harvie's Trs. The distinction is well

brought out in the case of Hamilton *v.* Cuthbertson (3 D. 494), where it was held that a creditor, claiming in his principal debtor's sequestration, was bound to deduct the dividends which he had received from the insolvent estates of co-obligants before the date of the sequestration. The argument for the unsuccessful creditor proceeded on the doctrine that a party who had several co-obligants bound to him conjunctly and severally was a creditor of each for his full debt, and was entitled to claim his full debt from the estate of each as if he were the sole debtor. This point was conceded; but the decision turned on the payments of the co-obligants having been made before sequestration, and such payments it was held extinguished the debt *pro tanto*, and precluded the creditor from ranking for more than the balance. Lord Mackenzie said :—'I think it was never intended that a party should acquire right of sequestration to claim for more than the actually existing debt; and I do not think that, in this case, it can be truly stated that the whole original debt was due to the date of the sequestration, when partial payments, which must *pro tanto* have extinguished it, had been made. In the event of there being no bankruptcy or sequestration, it is obvious that the creditor, who had previously received partial payments, could not have demanded the whole debt from the principal debtor, but must have imputed these payments *pro tanto* in extinction of it; and so it appears to me, that under the sequestration statute he could only rank for the balance due after deducting partial payments and draw a dividend on such balance, which dividend is payable solely on the debt as it exists at the date of the sequestration.' Lord Fullerton, after commenting on the prior decisions, said :—'These authorities, then, afford no sanction to the general proposition that a party is entitled to claim for the full amount of his debt, and is not bound to deduct partial payments received from co-obligants prior to the date of the sequestration. Such a pretension seems to be inconsistent with general principle, and was expressly rejected in a case referred to in these papers—the ranking of Edderline, 14th January, 1801. Considering, then, the general principle, the authorities on the subject, and the distinction expressly taken in the only cases in which the general principle has been modified, I must hold that partial payments made from other sources before the sequestration are to be deducted, and that the balance forms the true amount of the debt for which the creditor was entitled to claim. It is true that in that case the question did not arise with cautioners, but with parties to a bill who were liable as endorsers to the holder, but no distinction was taken on this head, and indeed the Lord Ordinary, whose judgment was reversed, did not distinguish between the case of sureties and that of ordinary co-obligants. It is also clear that if there had been no payments

by the co-obligants prior to the sequestration, but payments before the claim was made from their estates, these would not have fallen to be deducted in ranking on the estate of the principal debtor. The right of the creditors to rank for the amount due at the date of the sequestration would therefore have been exactly the same as the right of the bank in Harvie's Trs. *Primâ facie*, therefore, it would seem that the bank here ought to have no higher right. In other words, the payments made before sequestration go to reduce the debt for which the creditor may rank, whatever may have been the terms of the guarantee under which the payments were made. The bankrupt was no party to the guarantee, and the right of his other creditors cannot be thereby affected.

"Counsel for the bank were unable to say that there was any authority in Scotland which supported their contention, but they referred us to the case of the Commercial Bank of Australia ([1893] A.C., 181). The facts of that case were very special. A bankrupt and others had become guarantors to the appellant bank of a principal debtor's liability for a sum of £6,250. Three of the sureties entered into an agreement with the bank that there should be substituted for their obligation a deposit of £3,000 in the bank to be carried to a suspense account. The agreement conferred power on the bank to appropriate that sum whenever they thought fit in discharge *pro tanto* of the principal debt. It was held that such a deposit did not, until appropriation, operate as payment, and that the bank was entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety who was not a party to the agreement. The judgment, as I read it, proceeded entirely on the terms of the agreement, which recited that three of the sureties had proposed to pay the bank £3,000 in discharge of their several liabilities, and that the bank 'had declined to receive the said moneys in reduction of the said account.' It then went on to say that the bank had agreed with the three sureties that it would not look to them for more than £1,000 each 'on condition that the same sums or their equivalent shall be deposited to a separate account with the said bank, to be appropriated by the said bank in satisfaction, in part or in whole, of the said debt . . . . when and so soon as the said bank may deem prudent, the receipt of such sums being entirely without prejudice to the bank's right to sue or look to the other guarantors for the full amount of the said guarantees, it being understood that such money shall be and remain as a security to the bank for the due payment of the said respective sums of £1,000 each, credited to a special suspense account with the said bank accordingly.' I think the conclusion was irresistible that prior to the appropriation the deposit of £3,000 did not operate as payment of the debt. The deposit of the £3,000 merely came in place of the personal liability of the sureties, and as the Lord Chancellor

(Herschell) pointed out, the bank would neither have been justified in saying, nor bound to say, that £3,000 of the amount had been already paid if the debtor had tendered the entire amount due. It was exactly the same as if the sureties had deposited with the bank a security for £3,000 instead of the cash itself, they having stipulated that, as between them and the bank, the deposit of this security should operate a discharge of their liability under the guarantee. The essential points of distinction between the present case and that are that the bank had refused to accept a payment to account of the debt, and had made an agreement with the sureties under which it would have been liable, in the event of the principal debtor having paid his full debt, to refund to the sureties the amount of their security; whereas in the present case the cautioner made no condition and the bank undertook no obligation to him. 'The fallacy' (as the Lord Chancellor said) 'which lurks in the argument of the respondent is this, that it is suggested that the comparison is to be between the creditors of Wilson if no such agreement had been entered into, and the position of the creditors of Wilson if they can claim the benefit of this sum as a payment.' This is, as I humbly think, exactly the fallacy, *mutatis mutandis*, that underlies the bank's argument here. It is claiming on the bankrupt estate on the same footing as if it had agreed with the cautioner that his money was to be deposited merely as a security for the bankrupt's indebtedness, whereas no such agreement was made. How the bank dealt with the money is of little consequence. In point of fact it was put, not to a suspense account in name of the cautioner, but into a special account in name of the bank's own manager; and the interest on the money paid was treated as extinguishing *pro tanto* the interest on the principal debt. As in a question with the principal debtor, I think the bank was bound, if he had tendered the balance of the amount due on his account, to have given him a full discharge. In short, having received a payment from the cautioner towards the principal debt, the bank proposes to treat it for its own purposes as if it were merely a security held for an existing obligation of the cautioner. In my opinion the bank is not entitled to do so."

Appeal allowed.

*Note.*—The turning point in this case was whether the money was deposited as part payment of the principal debt or as security for the principal debtor's indebtedness, a sort of collateral security to the obligation of the guarantor. On the documents and the facts, notably that of the interest on the sum deposited being applied in reduction of the interest on the principal debt, the Court concluded that it fell within the former category, and that the bank could only prove with respect to the balance.

[IN THE KING'S BENCH DIVISION.]

## FLACH *v.* LONDON AND SOUTH WESTERN BANK LIMITED.

31 Times L.R. 334. Journal, Vol. XXXVI, p. 268.

*The meaning of "Refer to Drawer."*

Mrs. Rosie Flach sued the London and South Western Bank to recover damages for an alleged breach of contract by the defendants in wrongfully returning a cheque drawn upon them by the plaintiff, and also for damages for an alleged libel by the defendants in writing upon the cheque the words "Refer to drawer."

The defendants, in regard to the payment of the cheque, pleaded that they were protected by the moratorium. They denied that the words complained of were libellous.

The question of the dishonour of the cheque turned on the construction of a war moratorium proclamation, and is not now of immediate interest. If that proclamation applied, as the Judge held it did, the bank was under no obligation to pay the cheque. The case is only valuable for the judge's opinion as to the legitimate interpretation of the answer "Refer to drawer."

After stating the facts, counsel for the plaintiff submitted that the words "Refer to drawer," which meant that there were no assets or insufficient assets to meet the cheque, were in the circumstances a libel upon the plaintiff.

Mr. Justice Scrutton said that he doubted whether the words complained of were capable of a libellous meaning.

After the plaintiff had given evidence, Mr. Justice Scrutton said that before hearing further evidence he must be satisfied that the plaintiff had a cause of action. The points he desired to have argued were :—

(1) Whether upon the day the cheque was presented—August 10th—there was any obligation on the bank to honour it in view of the moratorium; and

(2) Were the words "Refer to drawer" capable of a defamatory meaning?

With regard to the first point, counsel for the plaintiff submitted that the moratorium did not apply, first, because the cheque was

drawn after August 4th; and, secondly, because it was provided that the proclamation should not apply in respect of a liability which when incurred did not exceed £5. He further contended that the words "Refer to drawer" placed upon a cheque which was refused, not because the drawer of the cheque had no assets, but owing to the effect of the moratorium, were clearly libellous.

On behalf of the defendants, it was submitted that there was no case to go to the jury. The result of the moratorium in the present case was that, whereas on August 6th the bankers were debtors of the plaintiff for £6 16s. 5d., when the moratorium came into operation they ceased to be debtors, and there was substituted for their obligation to pay on demand a duty to pay on September 4th following. The cheque in the present case was drawn for £4 5s., and the post moratorium balance was only £3 9s. 3d., and that being so there was no duty upon the bank to pay.

On the question of libel, counsel submitted that when general words were used which were consistent with a proper and innocent meaning and were also consistent with a defamatory meaning, they did not constitute a libel. The evidence in the present case was that the words "Refer to drawer" were the proper words to use whenever there was no available balance at a bank to meet a cheque. Here there was no available balance, and the words were consequently not libellous.

Mr. Justice Scrutton, in giving judgment, said that the first question was whether the moratorium protected the bank or not. After stating the terms of the moratorium proclamation and the facts of the case, he said that in his opinion the plaintiff's claim in respect of a breach of duty on the part of the bank failed, because the moratorium applied, and therefore the money was not due to the plaintiff when the cheque was presented.

With regard to the question of libel, the words "Refer to drawer" in his opinion, in their ordinary meaning, amounted to a statement by the bank, "We are not paying; go back to the drawer and ask why," or else, "go back to the drawer and ask him to pay." In the view he took of the case the bank were justified in not paying under the moratorium, and he did not think that it was possible to extract a libellous meaning from what had been said by the bank. Evidence had been given, however, to the effect that "Refer to drawer" meant that there was no money to pay the cheque. If that was the true meaning then on the view he had taken of the moratorium proclamation the statement was true and therefore not libellous. Taking the view that the words complained of were not capable of a libellous meaning, he must enter judgment for the defendants.

Judgment for the defendants.

*Note.*—In Szek *v.* Lloyds Bank (The Times, January 15th, 1908), Grantham, J., left to the jury the question of libel by returning cheques marked R.D. The jury gave no damages. In Frost *v.* London Joint Stock Bank (22 Times L.R., p. 760), the Court of Appeal, with regard to answers on cheques, laid down the general rule that where words are not obviously defamatory it is not what they might convey to a particular class of persons that is the test, but what they would naturally suggest to a person of average intelligence (*cf.* Smith *v.* Cox and Co., *post*, p. 285).

[IN THE KING'S BENCH DIVISION.]

## HOUSE PROPERTY COMPANY OF LONDON (LIMITED) AND OTHERS *v.* THE LONDON COUNTY AND WESTMINSTER BANK (LIMITED).

31 Times L.R. 479. Journal, Vol. XXXVI, p. 378.

*Collecting Bankers' Liability—Bearer Cheque Crossed "A/c Payee."*

In this case the House Property Company of London (Limited), dealers in real property, of Basinghall Street, E.C., and Mr. Edgar Alexander Baylis and Mr. Frederic Henry Keeling Durlacher, trustees of a certain trust fund known as the "Bingley Trust," claimed from the defendant bank £800 for the wrongful conversion of a cheque which the bank had collected for one of their customers who had paid it into his account in fraud of the plaintiffs.

Counsel for the plaintiffs, in opening the case, said that the action was brought for the conversion of a cheque drawn by the plaintiffs in favour of F. S. Hanson and others or bearer and crossed "A/c Payee." The plaintiffs for the purposes of their business had mortgaged certain property to the trustees of the will of a Mr. Bingley. The trustees in 1906 were Mr. Hanson and Mr. Baylis and Mr. Durlacher, who were plaintiffs in this action. In 1912 Mr. Hanson died, and Mr. Baylis and Mr. Durlacher were the remaining trustees. In March, 1912, a man named Norman, who was the solicitor for the trustees, wrote to the plaintiff company and told them that he was instructed to call in the amount of the trustees' mortgage owing to depreciation. This was done fraudulently, as no such instructions had been given. The plaintiff company entered into negotiations with Norman, and ultimately arranged to repay £800 of the £3,300 borrowed from the trustees.

On October 16th, 1912, the plaintiff company sent the cheque for £800 to Norman. That cheque was credited to Norman's account with the defendants at their St. Mary Axe branch on October 17th. After that date the plaintiff company paid interest on £2,500 only, but Norman continued to pay the trustees in full until the beginning of 1914. The defendants did not claim to be

*bonâ fide* holders of the cheque, but merely agents for collection, and the case against them at common law was clear, but the question was whether they were protected by sec. 82 of the Bills of Exchange Act. It was for the defendants to show that they had collected the cheque for a customer in good faith and without negligence. It was clear that Norman was not the "payee," and if the bankers had taken note of that marking on the cheque the loss would not have arisen.

For the defendants it was submitted that the cheque was a bearer cheque, and that, if the words "A/c payee" had any effect at all as regards the collecting banker, the defendants had collected for the a/c of the payee. So far as sec. 82 of the Act was concerned, it could not be said that a collecting banker who received a cheque from a customer made out to a named person "or bearer," was guilty of negligence in assuming that the person who presented it was not only the bearer, but the person entitled to be payee.

No evidence was called on behalf of the defendants.

JUDGMENT.

Mr. Justice Rowlatt, in giving judgment, reviewed the admitted facts of the case, and said that *primâ facie* they showed a conversion by the defendants. The real and only defence of the defendants was under sec. 82 of the Bills of Exchange Act, which would except them from liability if they had collected the cheque for a customer *bonâ fide* and without negligence. Counsel for the bank had argued that the cheque was made out to Hanson and others or bearer, and that Norman was the bearer, and that the defendants in collecting it for his account were collecting it for the payee. That was a shallow argument, as "payee" did not mean the owner of a cheque at the time it was presented, but the name written across the face of the cheque—in this case F. S. Hanson and others. No evidence had been called by the defendants, and they contended that they had not been guilty of negligence in allowing this cheque to be collected for a gentleman whom they knew to be a solicitor to be credited to his own account. The defendants offered no sort of excuse for so doing, and if he (his Lordship) were to say that they were entitled to do so without any explanation, he would be practically saying that a bank could not be negligent in respect of a cheque of that kind.

His Lordship then gave judgment for the plaintiffs for £800 and interest. Stay of execution was granted.

*Note.*—No appeal appears to have been made from this decision. The proposition that "account payee" affects a

bearer cheque as much as an order cheque is, at first sight, startling. But it must be admitted that in a cheque payable to "A or bearer" A is the payee as much as in a cheque "pay A or order."

In either case, the combination of "account payee" on a crossed cheque with "order" or "bearer" is a contradiction and complication, inasmuch as, in effect, though not legally, it destroys the negotiability of the instrument. Bearer, other than the payee, or endorsee cannot get the cheque collected. If he presents the cheque direct, it will not be paid, because it is crossed. He cannot sue drawer or endorser on it, because it has not been dishonoured, nor can he sue on the consideration, because the debt is suspended until and unless the cheque is dishonoured. Such are some of the anomalies arising from the introduction and toleration of this abnormal addition to the legitimate cheque. The recent appearance of "account payee only" may further complicate matters.

The practice is spreading; for instance, the London Telephone Service require cheques to be drawn to the Postmaster-General or bearer and crossed and marked "Account H.M. Postmaster General." To be a good discharge, if sent by post, the cheque must be drawn in conformity with this requisition, and thus recognition is obtained for the addition.

Why, in the case above reported, it should have been held negligence to collect the cheque for a solicitor, not apparently known to be solicitor to the plaintiffs, is difficult to see.

[IN THE KING'S BENCH DIVISION.]

## GARSTON OVERSEERS *v.* CARLISLE, SURVEYOR OF TAXES.

Reported. [1915] 3 K.B. 381. Journal, Vol. XXXVI, p. 403.

*Interest on Daily Balance—Income Tax.*

THE point was whether interest allowed by a bank upon the daily balance of a current account and credited to the customer half-yearly was "yearly interest" under the Income Tax Acts. It is a point which has hitherto aroused attention in the case of interest charged on overdrafts or loans made by a bank. In such circumstances, if such a payment is "yearly interest," the bank must allow income tax when charging the interest, and the case of Goslings and Sharp *v.* Blake ([1889] 23 Q.B.D., 324), decided that interest on a banker's short loan is not "yearly interest." In the present case the Overseers claimed exemption as charitable trustees under sec. 105 of the Income Tax Act, 1872, which grants exemption in respect of yearly interest applied solely to charitable purposes.

The Judge decided that interest on the daily balance of a current account, even though the payment is regularly made for a period of years, is not "yearly interest." "It is no doubt contemplated that the balance will continue for a long time," said the judge; but what is the daily balance? It is not even a short loan; it is merely money at call, money payable on demand."

*Note.—Cf.* Farmer *v.* Scottish North American Trust, *ante* p. 9.

[IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

## *In re* CARGO EX STEAMSHIPS "ODESSA" AND "WOOLSTON."

Reported. [1916] A.C. 145. 32 Times L.R. 103. Journal, Vol. XXXVI, p. 491.

*Rights of Pledgee of Cargo condemned by Prize Court.*

THESE were appeals from decrees of the President of the Admiralty Division of the High Court in Prize delivered on December 21st, 1914, and March 16th, 1915 (31 The Times Law Reports, 148). The question involved was the position of British bankers who had made advances on the security of goods carried by sea, of which they held the bills of lading, when the owners were enemy subjects. Their Lordships upheld the decision of Sir Samuel Evans that the rights of pledgees of cargo cannot be regarded in a Prize Court.

Lord Mersey, in delivering judgment in the case of the "Odessa," said :—"There is very much in common in the points arising in both cases, but as the facts and arguments are not identical it is desirable to consider each case separately.

"The facts in this case are :—The appellants, Messrs. J. H. Schröder and Co., are bankers carrying on business in London. The partners are Baron Bruno von Schröder, a naturalized British subject, and Frank Tiarks, a natural born British subject. The appellants had in March, 1914, agreed with a German company in Hamburg called the Rhederei Actien Gesellschaft von 1896 to accept the drafts of Weber and Co., a firm in Chile, for the price of a quantity of nitrate of soda to be sold and shipped by Weber and Co. to the German company. The drafts were to be drawn at 90 days' sight, and the appellants, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. The consideration for this accommodation was to be a commission of one-quarter per cent., payable by the German company to the appellants.

"In due course Weber and Co. shipped a cargo of nitrate on board the 'Odessa,' belonging to the German company, and took from the captain a bill of lading dated May 8th, 1914, in which the voyage was described as from Mejillones (the port of

shipment in Chile) to the ' Channel for orders,' and by which the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charter party (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo.

" Drafts for a total amount of £41,153 1s. 5d. (said to be the full price of the cargo) were drawn by Weber and Co. upon the appellants, and accepted by them on June 9th, 1914, in exchange for the bill of lading. War broke out between Great Britain and Germany on August 4th, 1914, the ' Odessa ' being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. ' Caronia ' and brought into Bantry Bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator-General claiming condemnation of both as lawful prize.

" On September 10th the drafts of Weber and Co. fell due, and were paid by the appellants. The ship was duly condemned, and no question arises with reference to her condemnation; but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders for full value of the bill of lading therefor and as British property not liable to condemnation. The learned President condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely pledgees, and as such not entitled to any precedence over the Crown.

" Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts—namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees of it at the date of the seizure. This indeed is hardly disputable, having regard to the case of Sewell *v.* Burdick (10 A.C., 74). The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading. The question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellant's claim to be paid out of the proceeds to arise from the sale thereof.

" It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas, or in the belligerents' territorial waters, and enemy cargoes. But such seizure does

not, according to British Prize Law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully-constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend on the ownership at the date of seizure, and is to be determined by evidence. The effect of condemnation is to divest the enemy subject of his ownership as from the date of the seizure, and to transfer it as from that date to the Sovereign or to His grantees. The thing—the *res*—is then His for Him to deal with as He thinks fit, and the proceeding is at an end.

"As the right to seize is universally recognized so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominion* as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the Court would be subject to a burden which it could not well discharge.

"There is a further reason for the adoption of the rule. If

special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

" Acting upon the principle of this rule, Courts of Prize in this country have, from before the days of Lord Stowell, refused to recognise or give effect to any right in the nature of a ' special ' property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of the Court to make an equitable allowance to the national or neutral lien-holder in respect of such services—(The Frances, 8 Cranch, 419). It is unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

" When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation." [After reviewing these cases his Lordship examined the arguments by which the appellants sought to establish that their title as pledgees created a special property in the pledge in favour of the pledgee constituting or equivalent to ownership.]

" Lastly, the appellants urged," his Lordship continued, " that if the Court now applies the principles illustrated by the cases referred to above very serious injustice will be done to and serious loss incurred by neutrals or subjects who, before the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been caused by the application of the same rules in the 18th and early 19th centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be

applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilised nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent right of capture that the Courts have refused to recognize such liens or rights, in spite of the hardship which might be caused to individuals from such want of recognition.

"It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty. (See the 'Belvidere,' 1 Dods, 353; and the 'Constantia Harlessen,' Edwards Adm., 232.) Whether his judgments were in any way based on that consideration or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed is an arguable point. In their Lordships' opinion, however, it is unnecessary to decide this point, for after hearing the Attorney-General they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

"Their Lordships would humbly advise His Majesty that the appeal should be dismissed."

*Note.*—This case is a contribution to the somewhat difficult question of the quantum of property passing when goods or documents of title are forwarded as cover for an acceptance. It is not always clear whether the possession of documents imports ownership or merely pledge. *Cf.* The "Prinz Adelbert" [1917] A.C., 586. And sometimes a mere residuum of ownership or control remains in the original owner of the goods.

The bearing of Prize Court law on the matter may not be of present or general importance.

[IN THE SCOTTISH COURT OF SESSION.]

## CLYDESDALE BANK *v.* CONTINENTAL CHOCOLATE CO.

Journal, Vol. XXXVII, p. 45.

### *Authority of a Partner.*

THE defenders of the action were a firm of three partners who opened an account with the bank on which it was arranged that cheques might be drawn by any one of the three parties. One of these overdrew the account and the other partners denied liability on the following grounds: That the cheques which were challenged were drawn by the partner, Charles, for a purpose apparently not connected with the firm's ordinary course of business; that the bank were aware of this; and that the bank had failed to prove that Charles had authority, or that they had reasonable grounds for believing he had, to bind the firm. The judge held that the defenders had failed to establish these propositions.

*Note.*—It would seem that very conclusive evidence ought to be forthcoming to impute to a bank knowledge that cheques are drawn for a purpose outside a partnership's ordinary course of business, for a bank is not usually aware of the precise limitations to the scope of a firm's business, and it can do no more than guess at the nature of the transaction which gives rise to the drawing of a cheque. If a partner in a firm of solicitors draws cheques payable to a wine merchant he may of course be paying his private debts, but there is at least equal reason for drawing the conclusion that the transaction has arisen in connection with the business of the firm.

Analogous cases have occurred of cheques drawn by a customer on a trust account for private purposes. In *e.p.* Adair, 24 L.T., at p. 203, it was suggested from the Bench that a banker ought to dishonour a cheque drawn by a customer on a trust account payable to that customer's tailor, known to be such; but the suggestion was not adopted in *e.p.* Kingston (L.R., 6 Ch. 622) which was the appeal from that decision. There are somewhat similar statements in Jackson *v.* Bristol Bank (1 Times L.R., p. 522), which are subject to the same criticism.

[IN THE CHANCERY DIVISION.]

## NATIONAL PROVINCIAL BANK OF ENGLAND *v.* UNITED ELECTRIC THEATRES, LTD.

Reported. [1916] 1 Ch. 132. Journal, Vol. XXXVII, p. 96.

*Floating Charge.*

THE point at issue was whether a charge created by an assignment upon certain chattels and effects was a floating charge or a specific charge.

Lord Macnaghten has defined a floating charge as "an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes."

The bank took a legal assignment of the chattels then or thereafter placed on the company's business premises, and it was admitted that the bank intended to allow the company to use the chattels in carrying on their business. The bank claimed that the legal assignment was not a floating charge, but a specific charge. The Court, however, held the contrary, and Mr. Justice Astbury quoted with approval from a judgment of Lord Justice Romer in the Court of Appeal, in which he held that a charge by a company which contains the three following characteristics is a floating charge, even though in form a legal assignment.

(1) If it charges present and future assets; (2) if it is a charge on a class of assets which in the ordinary course of the business of the company would be changing from time to time; (3) if it is contemplated that until some future step is taken the company may, as regards the assets in question, carry on its business in the ordinary way. Mr. Justice Astbury added that if the parties had intended it to be a fixed charge on the chattels existing at the date of the mortgage it would have been a very simple thing to provide a schedule of them in the assignment.

*Note.*—This definition, involving, as it does, the right of the creator of a floating charge to subject the property to a subse-

quent but preferential claim or dispose of it altogether emphasizes the doubtful value of such a security. It is entirely in the option of the chargor whether he brings any fresh plant on to the premises or not, and the old is continually deteriorating.

In a fixed charge, the latter is the main, but a very serious consideration.

[IN THE COURT OF SESSION (SCOTLAND). SECOND DIVISION.]

## DICKSON *v.* NATIONAL BANK OF SCOTLAND.

From the Accountants' Magazine. 54 Scottish Law Reporter, 449. Journal, Vol. XXXVII, p. 182.

*Deposit Receipt payable on the signature of a Firm—Payment to a Partner of the Dissolved Firm.*

In 1890, a sum of £155, belonging to an executory estate, was placed on deposit receipt in the National Bank of Scotland. The deposit receipt bore that the money had been received from the executors, and that after November 21st, 1890, it should be payable upon the signature of Messrs. A. B. and C., W.S., the agents for the executors. In 1896, the firm of A. B. and C. was dissolved by the retiral of C., and A. and B. carried on the business as A. and B. In 1898, A. died, and B. took into partnership D., still carrying on business as A. and B. In 1904, B. applied to the bank for payment of the money deposited, and upon his endorsing the deposit receipt with the signature of A. B. and C., and also with the signature of the firm A. and B., he received payment from the bank. Subsequently, he misappropriated the money. In 1914, the representatives of the executors claimed the money from the bank, on the ground that they had paid it neither to the depositors or persons in their right, nor to the persons authorized on the face of the receipt to receive payment. The bank maintained that their only contract was with A. B. and C., and therefore the pursuers had no title to sue; and further, that they had paid in terms of their contract, B., as sole surviving partner of the firm of A. B. and C., being entitled to receive payment on behalf of that firm. Lord Anderson held that the pursuers had a title to sue. The terms of the deposit receipt did not preclude the bank from making payment to the depositors themselves, for the latter could at any time have recalled the mandate to the bank to pay to their agents. As regarded the second defence, under the Partnership Act, 1890 (sec. 38), a dissolved partnership was held to subsist "so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise." But in this case B. was not collecting an asset of the old firm, nor was he completing any unfinished transaction. The fact that he had endorsed the

receipt with the name of A. and B. as well as with that of A. B. and C., showed that the bank knew that they were paying the money to A. and B. It was a case of one of two innocent parties suffering from the fraud of a third; and here, in his opinion, it was the bank which had been negligent. In the circumstances, after the lapse of fourteen years, they should have been put on their inquiry as to whether the executry still continued, as to who were the actual owners of the money, and as to whether the authority to pay to the agents still subsisted. Accordingly, he held that the bank was liable.

The bank appealed.

The Second Division of the Court of Session reversed the judgment, holding that B. had been within his legal rights in affixing the firm's signature either on the ground that it was a necessary act to wind up the partnership, or that it was necessary to complete a transaction begun but unfinished at the date of the dissolution of the firm. It was not said that the signature was a forgery and the bank was entitled to say that if the receipt bore the signature of the firm to whom they were bound to pay the money, they were both entitled and bound to pay to the person who presented the receipt. It was no concern of theirs what became of the money after it was so paid.

Judgment for the bank.

*Note.—Cf. In re* Bourne, [1906] 2. Ch. 427, as to the scope of sec. 38 of the Partnership Act, 1890.

[IN THE CHANCERY DIVISION.]

## MACKERETH *v.* WIGAN COAL AND IRON COMPANY.

Reported. [1916] 2 Ch. 293. Journal, Vol. XXXVIII, p. 298.

*Company's Claim to lien on Trust Shares.*

SHARES not fully paid up in the defendant company were held by trustees, and the company, whose articles gave them a first and paramount lien over their partly paid shares, had advanced money to one of the trustees and asserted their lien on the shares, notwithstanding that they had received notice of the interest of the beneficiaries under the trust.

The company relied on sec. 27 of the Companies (Consolidation) Act, 1908, which runs :—"No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland." Furthermore the company's articles of association provided as follows :—"No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof."

The Court, following the judgment of the House of Lords in Bradford Banking Company *v.* Briggs (12 App. Cas., 29), held that the company was wrong in asserting its lien against the beneficiaries. Section 27 of the Companies (Consolidation) Act and the clause in the articles quoted above referred to the company's obligations in registering transfers of shares, and where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party.

*Note.*—The principle here illustrated would preclude a bank from claiming a lien on shares of its own for moneys advanced to any one known to hold them in a fiduciary capacity. Section 27 of the Act of 1908 is obviously not framed to cover such a position. When a shareholder dies his shares are usually transferred into

the names of the personal representatives in such circumstances as to constitute notice to the bank that they are held in a fiduciary capacity. Executorship may merge into trusteeship, or the shares may come under settlement. But so long as the bank have knowledge that the nominal shareholder is not the beneficiary it cannot advance money to him personally and claim a lien on its own shares for that money.

Nor is it conceivable that any articles or internal regulations could be framed or sanctioned which would secure any such right against a beneficiary, who is in no relation with the bank, except perhaps keeping an account there. The ordinary article as to non-recognition of trusts is, as shown by the above case, absolutely inapplicable to the matter.

[IN THE CHANCERY DIVISION.]

## COLEMAN *v.* LONDON COUNTY AND WESTMINSTER BANK, LIMITED.

Reported. [1916] 2 Ch. 353. Journal, Vol. XXXVII, p. 321.

*Advance on Debentures—Subsequent notice of trust—Negligence of Trustee—Rights of Beneficiaries.*

THIS was an action which raised a question of priorities under these circumstances.

In March, 1893, a private company, called T. W. Coleman, Limited, was formed to acquire the business of T. W. Coleman, deceased, under whose will his widow, Annie Coleman, and his three sons were interested in the property. Part of the consideration paid by the company for the property was forty-five debentures of £100 each of the company, secured by the usual debenture trust deed dated April 1st, 1893, of which Edward Coleman was the sole trustee. The debentures were issued to Annie Coleman, who, by deed dated April 6th, 1893, made in pursuance of a family arrangement, settled them upon trust for herself for life, with remainder to her three sons in equal shares. At the same time she executed a deed of transfer of the debentures to Edward Coleman, who was the sole trustee of the settlement, and this transfer and the debentures came into his possession as such trustee, but he did not register the transfer in the books of the company. Annie Coleman and her three sons were the directors of the company.

In January, 1894, E. H. Coleman, one of the sons, assigned for value all his personal property, which included his one-third share, or fifteen of the said debentures, to his wife Florence Coleman, and thereafter ceased to be a director of or connected with the company.

In 1908 the debentures were returned to the company to be restamped and reissued, and in 1911 Annie Coleman, who in some way then had possession of the forty-five debentures, deposited them with the defendants, the bankers of the company, as security for the company's overdraft, and signed the usual memorandum of charge and declaration of trust of the debentures in favour of the bank. Before taking the charge the bank caused

the company's register of debentures to be inspected, and ascertained that Annie Coleman was the registered owner of the debentures. The bank had in their possession a tin box, labelled "T. W. Coleman, Limited," deposited with them for safe custody by the company and containing documents of the company, but the bank did not know the contents of the box and had not a key to it.

On June 19th, 1913, the bank gave written notice of their charge to Edward Coleman, as the trustee of the debenture trust deed of April 1st, 1893, which he formally acknowledged by return of post. In September, 1913, he died. On January 5th, 1914, the company by resolution appointed Mr. Morris, the manager of the bank, trustee of the debenture trust deed in the place of Edward Coleman. For the purposes of his appointment Mr. Morris was given the key of the tin box, and examined its contents, and, among the documents, found the settlement of April 6th, 1893, and Annie Coleman's deed of transfer of the debentures to Edward Coleman. This was the first notice to the bank of the existence of these two documents. They at once took a transfer of the debentures from Annie Coleman under their charge and registered their transfer in the books of the company, and also obtained from the two sons (the directors of the company) an assignment of their respective reversionary interests under the settlement. In February, 1914, Annie Coleman died.

In 1915 Florence Coleman and the executors of Edward Coleman brought this action against the bank, claiming a declaration that the bank had no title to the fifteen debentures and an order that the bank should hand over and transfer such debentures to them. The bank by their defence did not admit the plaintiff's title, and pleaded the negligence of Edward Coleman in not registering his deed of transfer in the debenture register of the company, and his non-disclosure to the bank of the existence of the settlement and his deed of transfer when he received notice of their charge. Fraud was not suggested on the part of any of the parties.

Neville, J. :—"This is a case of some complexity. It is to be observed that the bank gave their notice to Edward Coleman as the trustee under the debenture trust deed. Why that should have been supposed to be necessary or advantageous I do not know, but it is clear that on June 19th, 1913, he became aware of the fact that two years previously, on April 11th, 1911, Annie Coleman had deposited the debentures as security with the bank. Obviously that must have shown him that the transaction was wrong, because he was the trustee of the debentures for her for life with remainder to her sons, and, however she had obtained possession of them, she clearly had no right to deal

with them as she did. For some reason which we cannot now fathom—I am clear there was no fraud about the matter on anyone's part—he apparently got confused or must have forgotten that what was being done was inconsistent with the trusts of the settlement of which he was trustee. The position of affairs then was this. On April 6th, 1893, the same date as the settlement, Annie Coleman had executed a transfer of the debentures to Edward Coleman, but that transfer had unfortunately never been registered, and on January 20th, 1894, one of the sons, E. H. Coleman, had transferred his interest under the settlement to Florence Coleman, one of the plaintiffs. The consequence was that, although apparently Annie Coleman and her two sons, who were then the three directors of the company, knew what was being done with the debentures and no doubt agreed to it, they appear to have forgotten, or at all events paid no heed to the fact, that one of the *cestuis que trust* was the wife of their brother, who had gone away and ceased to be connected with the company, and no communication of any sort or kind seems to have been made to him. Matters remained in that position until January 5th, 1914, when one of the officials of the bank, Mr. Morris, who had been appointed after Edward Coleman's death trustee for the debenture holders, opened a box which had been delivered to the bank for safe custody by the company, and in that box, which was marked with the name of the company, and was undoubtedly held by the bank on account of the company for safe custody, the bank found the settlement, and then for the first time had notice of the trust. The bank are entirely free from blame in the matter. When they took the deposit and custody of the debentures from Annie Coleman they inspected the register and found that she appeared to be the registered owner of the debentures, and until they got this notice they had no reason to doubt that the transaction with them was perfectly straightforward. Subsequent to that notice they obtained a transfer from Annie Coleman; but this they knew was a second transfer, a transfer having been already made under the settlement, and they subsequently succeeded in getting the company to register that second transfer. It appears to me that second transfer can make no difference to the rights of the parties. I think that from the date of the execution of the transfer in 1893 Edward Coleman, as the trustee of the settlement, had the right to have his transfer registered if he had applied for it to the company. I do not think that the company was in a position to register anybody but the true owner, and I think further that the bank got nothing under their transfer from Annie Coleman. On both these grounds I think their position was not improved by the transaction that took place after they had notice of the settlement. Therefore the rights of

the parties are to be ascertained as on January 5th, 1914, after discovery of the existence of the settlement. Were the bank then entitled to the interest of the plaintiffs? They took, no doubt, the interest of the other two sons; there is no doubt about that; but had they any right as against the interests of the plaintiffs?

"Now first of all the question arises as between the bank and the trustee, and there the case is certainly one of some difficulty, because the facts are rather peculiar. Nothing, I think, can be alleged against Edward Coleman until the receipt of the bank's notice in 1913, and then undoubtedly he did get notice of the transaction of 1911, and it is said that, as between himself and the bank, his silence on that occasion prevents his recovering, as trustee for the plaintiff Florence Coleman, her share of the debentures under the settlement. I think the only defence in an action brought by him after he had obtained registration of himself as the owner of the debentures, which registration he could have called upon the company to effect at any time, would have been in this way: he would have been in a position to sue the bank for the debentures, and unless they could have relied upon estoppel—such estoppel as is illustrated by the case of Pickard *v.* Sears ([1837] 6 Ad. and E., 469)—they would have had no defence to the action; but I do not think that his silence on being informed of the transaction two years old would have been enough to enable them to establish an estoppel against him in such an action. I think, therefore, that defence would not entitle the defendants to succeed in the present action. But the case does not really rest there, because the beneficiary is a co-plaintiff, and the question to be considered is whether, even supposing the representatives of the trustee themselves are unable to recover against the defendants, the beneficiary is entitled to recover. It is said she cannot, because her title can be no higher than that of the trustee: therefore, if I am wrong in thinking the trustee could succeed, she cannot succeed any better, and reliance for that proposition is placed upon two cases, one of them being a decision of Pearson, J. in Lloyds Banking Co. *v.* Jones (29 Ch. D., 221). In that case the title deeds of certain property had been, from the first, out of the possession of the trustees, with the result that a subsequent equity was created. The question was whether the legal estate of the trustee and the right of the *cestui que trust* could be preferred to that equity. The facts are only material owing to a subsequent decision by Parker, J.; but there is one very material passage in the judgment of Pearson, J. which has to be considered. The learned judge says (29 Ch. D., 227): 'The question is, whether, under the circumstances, the bank are entitled, although they are only equitable mortgagees, to priority over the legal estate

vested in the trustees of the settlement. It is said that the infant defendant has a better equity than the trustee has. I demur to that proposition entirely. I think I should be introducing a most fatal doctrine if I were to say that, when the legal estate in property is vested in a trustee under a marriage settlement, the simple fact that his *cestuis que trust* are ignorant of what he is doing gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the *cestuis que trust*.' I should have thought the learned judge had been misreported there, and that he could not have used the words attributed to him; but, inasmuch as Parker, J. has subsequently recognized them in a case to which I am going to refer, I think I must take it that the proposition is intended to stand in the terms in which we find it. I can only say that, read literally, it appears to me to be in conflict with authority, and that it gives the go-by to many decisions in which it has been held that, as between two equitable owners, one equitable owner taking under a settlement and the other equitable owner taking in breach of the trusts of the settlement, although the trustee of the settlement himself could not recover against the owner of the equitable interest which he has created, that does not stand in the way of a *cestui que trust* asserting his right, supposing there is nothing to make the equity of the second taker superior to that of the first. An authority for that proposition is Shropshire Union Railways and Canal Co. *v.* Reg. (L.R. 7 H.L., 496). It is to be borne in mind that the case decided by Pearson, J. was a case in which the title deeds had been out of the hands of the trustee from the first; he had not got possession of them. The case of Lloyds Banking Co. *v.* Jones (29 Ch. D., 221) was considered in Walker *v.* Linom ([1907] 2 Ch., 104) by Parker, J. as he then was. The learned judge goes at great length through the cases and he distinguishes, and, as I understand, justifies, the decision of Pearson, J. on the ground, which is not referred to in the judgment of Pearson, J., that it was a case where the deeds had never been in the hands of the trustee at all, but had been left in the hands of a third party; and, the same circumstances arising again in the case of Walker *v.* Linom ([1907] 2 Ch., 104), the learned judge considers the matter and follows, as I understand it, the decision of Pearson, J., taking it to be a decision that there is a distinction between the cases where the trustees are not originally put in possession of the title deeds and the cases where, having the title deeds, they proceed to misuse them and create an equitable title afterwards. I do not suggest for a moment the case before the learned judge was not itself correctly decided, but with regard to the general observations of the learned judge on pp. 118 and 119, speaking with the greatest

possible respect, it seems to me that once the trust is accepted and the property conveyed to the trustee, the trustee, and the trustee alone, is the owner of the deeds. Nobody but the trustee can recover them, and should a *cestui que trust* try to get them, he or she must fail because of the existence of the trusteeship. Any attempt to set up a title against the trustee must inevitably fail. That, it seems to me, is only another way of saying that the trustee is trustee of those deeds: he can get them, and when he gets them he has to hold them for the benefit of the *cestuis que trust*. But, whether that be so or not, there is a broad distinction between the cases I have cited and the case which I have to decide. Here I think that at any moment Edward Coleman, the trustee, and he alone, could have obtained registration in his own name, and that the plaintiff *cestui que trust* is quite free from any act done or omitted to be done which could raise an equity against her. She is prior in point of time to the bank, and I can see no ground upon which the equity of the bank can be said to be a better equity than hers. I do not think that the trustee's omission to obtain registration of his transfer stands at all upon the same footing as allowing deeds to remain in the hands of third persons after the execution of the trust. It seems to me there is a distinction between the two cases, and I therefore come to the conclusion the rule applies that the equity first in time prevails over the later equity, except in cases where the later equity is the better one. The second equity is not the better one here, and I am therefore of opinion that the plaintiffs are entitled to succeed. There will be a declaration in the terms asked for by the statement of claim, and the fifteen debentures can be handed over either to the plaintiffs, the representatives of Edward Coleman, or, with their consent, to their co-plaintiff, Florence Coleman."

*Note.*—This case affords an example of the subtleties of equity in dealing with priority of mortgages.

The problem, condensed, was as follows:—

A trustee holds forty-five debentures under settlement by A for A for life, remainder to three sons equally. He does not register the transfer. One son assigns his fifteen to his wife for valuable consideration. Somehow settlor, A, gets hold of the forty-five debentures. Deposits them with bank with memorandum and declaration of trust as security for overdraft.

Following year bank discover the original settlement and deed of transfer to trustee, of which they had no previous knowledge, having searched register and found A registered owner. Bank take transfer from settlor and get it registered. Settlor dies. Trustee and son's wife sue bank for the fifteen debentures.

The Judge held that the bank was liable and ordered the fifteen debentures to be handed back to the representatives of the trustee, who was dead, or with their consent to the son's wife.

He held that the dealings between the bank and the settlor, after the former obtained knowledge of the settlement could not stand; that the omission to register did not bar the trustee's legal title.

But he said that, even assuming the trustee was not entitled to succeed, because of the non-registration and some other matters which were set up as a defence against him, there remained the claim of the son's wife, as *cestui que trust* of the fifteen debentures.

Her title and that of the bank were both equitable, her's prior in time. Was there anything to turn the scale in favour of the later one of the bank?

In Lloyds Bank *v.* Jones (29 Ch. D., 221) Pearson, J., held that a *cestui que trust* could in no case have a better title than his trustee.

Neville, J., dissents from this, and cites Shropshire Union Railways and Canal Co. *v.* Reg. in the House of Lords (L.R., 7 H.L., 496) in support of his own view.

But he then refers to Walker *v.* Linom ([1907] 2. Ch., 104), a decision of Parker, J., in which he followed Pearson, J., in the case above referred to. Then he points out that in these two cases the trustee had never got possession of the title deeds, and he differentiates the case before him on the ground that there the trustee had had possession of the debentures for some years, but that somehow or other the settlor got hold of them and pledged them with the bank. And on this basis he held that the title of the son's wife, the *cestui que trust*, prevailed over that of the bank.

The distinction is hardly one which commends itself to the lay mind.

Whether the trustee omits to get the deeds in the first instance or whether, having once got them, he subsequently parts with them, knowingly or unwittingly, the *cestui que trust* has no knowledge of or say in the matter; according to Neville, J., himself, when once the property in the deeds is vested in the trustee, as it is by the deed of settlement, apart altogether from possession of them, he, and he alone, has the right and title to them. The *cestui que trust* can neither claim them nor control the trustee's dealings with them. Why, therefore, the *cestui que trust*'s rights as against a third party should depend on the apparently immaterial difference whether the trustee was or was not ever in possession of the deeds, strikes one as hardly a practical proposition. And the same with regard to the third party, in this case, the bank.

Possibly the idea is that a trustee who never troubles to get the deeds at all is guilty of grosser negligence than one who, having got them, lets them go, and that, in the former case, there is a surplus of negligence to attach vicariously to the *cestui que trust;* but this is a somewhat casuistical doctrine to import into business relations.

[IN THE CHANCERY DIVISION.]

## CHRISTY *v.* HAYMAN, CHRISTY AND LILLEY (LIMITED).

Reported. [1917] 1 Ch. 283, 545; [1917] W.N. 26, 75. Journal, Vol. XXXVIII, p. 112.

*Debentures issued by Insolvent Company to secure existing Debt.*

This was a summons to discharge the certificate of a Master so far as it allowed a sum of £408 16s. 6d. for debt and interest thereby certified to be due to the London City and Midland Bank in respect of four second mortgage debentures which were issued to the bank by the defendant company in April, 1916. The company went into liquidation in May, 1916.

The company had been customers of the bank for many years and had with the bank a loan account and a current account. The loan account was for £3,000, for which securities had been given to the bank. These securities included promissory notes for £350, payable on March 27th, 1916, and also property which the bank in December, 1915, allowed the company to sell for £392, the proceeds of sale being placed to the credit of the company's account. In March, when the promissory notes became due, the bank pressed for payment. The whole position was then reviewed, and the directors of the company promised to issue to the bank four second mortgage debentures of £100 each. This was done in order that banking facilities should be continued. After the promise to issue the debentures, the bank cashed cheques for considerable sums, so that on certain dates in April and May, 1916, there was an overdraft of between £300 and £400, but when the company went into liquidation in May the current account was in credit, as the fresh advances of the bank had been paid off in the ordinary working of the account. The liquidator contended that under sec. 212 of the Companies (Consolidation) Act, 1908, the debentures were invalid because they were created to secure a past debt within three months of the commencement of the winding up, and the company at the date of the creation of the charge was insolvent.

Mr. Justice Astbury, in giving judgment, said :—" It is clear that these debentures were issued to the bank partly as security for the loan account, the securities for which had been reduced,

and partly in consideration of the bank's meeting cheques on the current account. The company was insolvent when the debentures were issued and was wound up within three months. Section 212 of the Companies (Consolidation) Act, 1908, provides that—

" ' Where a company is being wound up, a floating charge on the undertaking or property of the company created within three months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge together with interest on that amount at the rate of five per cent. per annum.'

" Mr. Justice Parker, in the Orleans Motor Company (Limited) ([1911] 2 Ch., 41), said that the section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which did not go to swell their assets and become available for creditors. These debentures were taken as security for the old debt plus an agreement to continue the current account. The words ' except to the amount of any cash paid to the company ' mean, except to the amount of the cash actually and unconditionally paid to the company. When a debenture is issued as a security the words must be read with regard to the amount of cash paid for the security plus such interest at 5 per cent. as may be owing at the date of the winding up. Where it is issued partly for a past debt and partly for a fresh advance, so far as it is issued for a past debt it is invalid, and so far as it is a security for a current account it is only valid to the amount due at the date of the winding up. There was no indebtedness on this current account at the date of the winding up. The Master's certificate must therefore be varied by disallowing the four second debentures issued to the bank."

## EVANS AND WIFE *v.* LONDON AND PROVINCIAL BANK.

From the Times, March 1st, 1917. Journal, Vol. XXXVIII, p. 126.

*Damages for Dishonour of Cheque.*

Engineer-Commander Evans had an account with the bank, which, on the outbreak of war, in the expectation of service abroad, he transferred into his wife's name. Owing to a mistake on the part of the bank a cheque for £10 drawn by Mrs. Evans payable to the steward of the ship in which Commander Evans was serving, was wrongfully dishonoured.

The action was brought in the joint names of husband and wife, and it was argued that, the account being in fact, though not in name, that of Commander Evans, he was entitled to prove special damages because the dishonour of the cheque imperilled his career in the Navy. The Lord Chief Justice, however, ruled that the account was not that of Commander Evans, and that Mrs. Evans was the only person, if any, entitled to damages.

The second point then arose. What damages was Mrs. Evans entitled to recover? Counsel for the bank argued that in the case of a non-trader definite damage must be proved. The Lord Chief Justice deferred his decision on this point until the jury had given their verdict. As, however, the jury awarded damages of one shilling only, it was not necessary to decide the point.

*Note.—Cf.* Smith *v.* Cox and Co. (Journal, Vol. XLIV, p. 200, *post*, p. 285); Cox *v.* Cox and Co. (Times, March 18th, 1921); Wilson *v.* United Counties Bank ([1920] A.C., 112, 132).

All these cases go to show that, save in the case of a mercantile man or a trader, where actual damage is presumed to have resulted from the dishonour of a business cheque, special damage must be proved before a plaintiff can recover substantial damages. The old idea that, under all circumstances and conditions, dishonour, unless justified, involved substantial compensation must now be treated as exploded. That idea was probably based on Marzetti *v.* Williams (1 B. and Ad., 415) and Rolin *v.* Steward (23 L.J.C., p. 148), and while it obtained, damages were generously and somewhat indiscriminately awarded.

As to libel by answers on returned cheques, see Flach *v.* London and South Western Bank, *ante* p. 123.

[IN THE CHANCERY DIVISION.]

## HOPKINSON *v.* MORTIMER, HARLEY AND CO., LTD.

Reported. [1917] 1 Ch. 646; [1917] W.N. 99. Journal, Vol. XXXVIII, p. 203.

*Lien on Company's own Shares.*

By the articles of Association of the defendant company, it was provided that it should have a lien on its shares for debts due by the registered holders of such shares to the company, and that the Board might by resolution forfeit the shares subject to such lien on seven days' notice. The Judge held that such power of forfeiture was *ultra vires* and invalid on the grounds that its exercise would (*a*) amount to a reduction of capital, which would be illegal unless sanctioned by the Court, and (*b*) operate as a clog on the equity of redemption.

*Note.*—The articles of association of most banks prescribe a sale of the shares as the method of enforcing a lien, and such banks are not directly affected by the judgment of Mr. Justice Eve. In some instances, however, the articles prescribe the more old-fashioned method of forfeiture first and sale afterwards, and banks with such articles would do well to take the necessary steps to alter them so as to permit the sale of the shares without the necessity of forfeiture.

It should be noted that the Court distinguished forfeiture for the purpose of enforcing a lien from forfeiture of partly paid shares owing to the non-payment of calls, and recognized that the exercise of the power of forfeiture in the latter circumstances is reasonable and sometimes necessary.

[IN THE HOUSE OF LORDS.]

## YOURELL AND ANOTHER *v.* HIBERNIAN BANK LIMITED.

Reported. [1918] A.C. 372; [1916] 1 I.R. 312; [1917] W.N. 297.
Journal, Vol. XXXIX, p. 26.

*Mortgage—Appointment of Receiver—Appropriation of Payments.*

Appeal from a decision of the Court of Appeal in Ireland, reversing the decision of O'Connor, M.R.

The action was brought by the respondent bank to enforce a mortgage, and the question was as to the principle on which the accounts should be taken. On November 29th, 1899, W. J. Yourell, who was then indebted to the bank on his current account in the sum of £84 odd, mortgaged certain lands to secure payment of the moneys for the time being owing to the bank on foot of the covenant for payment hereinafter stated, the proviso being limited to take effect on payment of these moneys; but the deed contained a clause limiting the principal sum recoverable on the mortgage to £5,700. Yourell's brothers and his sisters, who were the appellants, also joined in the deed in respect of their interest in the lands to be charged. By the covenant for payment Yourell covenanted to pay to the bank £5,700 (erroneously stated to be due to them), with interest at the current bank rate up to 6 per cent., and also on demand to pay them the balance which on any account might be owing to them on foot of overdrafts, bills of exchange, promissory notes, loans, credits, advances, interest, commission, discount, premiums on policies of assurance, costs, customary charges or otherwise. In keeping Yourell's current account, which was continued from the date of the mortgage until after the commencement of this action, the bank charged him with interest from day to day on his debit balance for the time being, and, the account being kept with half-yearly rests, the interest so charged was capitalized every half-year. In July, 1903, Yourell owed to the bank on his current account £2,964, and on promissory notes £3,600.

The bank required Yourell to reduce his overdraft by £800, and on his failure to do so refused to honour his cheques. The bank, however, allowed him to draw certain cheques for the purpose of preserving the security and made certain payments themselves for the like purpose, debiting the same to the overdrawn account. In December, 1904, the bank, under the powers

of the Conveyancing Act, 1881, appointed a receiver of the mortgaged premises, and he remained in possession till 1910. The receiver opened an account with the bank, and the credit balances on that account were carried over annually to Yourell's current account. In 1910 the bank, in exercise of their power under the mortgage, sold part of the mortgaged property for £3,540, and this sum was credited to Yourell's current account.

The bank contended that the current account ought to be treated as closed as from the date of the receivership deed, and that all entries after that date should be struck out and reincorporated in an account to be taken as between mortgagor and mortgagee, with the result that all the sums received by the bank from the receiver out of rents and profits (subject to certain prior payments), and all the sums received by them from the sale of a part of the mortgaged property would be applied in the first instance in discharge of the interest due on the mortgage instead of being appropriated in reduction of principal, as resulted from the mode in which the bank kept the account.

The Master of the Rolls held that the current account had not been closed, and directed the accounts to be taken on that footing.

The Court of Appeal (O'Brien, L.C., and Molony, L.J.; Cherry, C.J., dissenting) held that as from the date of the appointment of the receiver the current account should be treated as closed, and that the account should be taken as an ordinary mortgagee's account.

The House, after consideration, allowed the appeal and restored the order of the M.R. (with a variation). Upon the main question their Lordships were of opinion that there was no ground for treating the current account as closed. With regard to the duty of the receiver, their Lordships declined to accede to the contention of the bank that, having regard to sec. 24 (8) of the Conveyancing Act, 1881, it was illegal for the receiver to allow his credit balances to be transferred to the current account and so go in reduction of principal. The duty imposed by the statute was owed merely to the mortgagor, the mortgagee and the *puisne* incumbrancers (if any), but the statutory mode of application could be varied by the consent of the parties concerned. It was not open to the bank to rely on the illegality alleged. A further contention of the bank, namely, that they had a lien on the mortgaged premises for the moneys paid to preserve the subject-matter of the security, also failed, because, in their Lordships' opinion, on the facts the true view was that the payments for this purpose were not really made by the bank, but were made by Yourell himself out of moneys advanced to him by the bank.

Appeal allowed.

[IN THE COURT OF APPEAL.]

## PANOUTSOS *v.* RAYMOND HADLEY CORPORATION.

Reported. [1917] 2 K.B. 473. Journal, Vol. XXXIX, p. 75.

*Irrevocable Letters of Credit.*

A CONTRACT for the shipment of flour was signed, containing a clause that payment should be by confirmed bankers' credit. A credit was opened by a New York bank, who wrote to the sellers that "in advising you that this credit has been opened, we are acting merely as agents for our foreign correspondents and cannot assume any responsibility for its continuance," whereupon the seller sought to cancel the contract on the ground that the buyer had failed to perform the condition as to payment by a confirmed banker's credit. The sellers lost their case because on the facts they were held to have waived the breach of contract, but throughout the case it was assumed that a confirmed banker's credit was necessarily irrevocable. "This letter," says the report of the case, referring to the advice of the New York bank quoted above, "showed that the credit was not irrevocable and therefore was not a confirmed banker's credit." Again: Viscount Reading, C.J., after referring to the contract and the facts, said that the letter of October 16th from the National Bank of Commerce showed that the credit was not irrevocable, and to that extent did not comply with the condition of the contract as to a "confirmed bankers' credit."

[IN THE CHANCERY DIVISION.]

## *In re* FRANCKE AND RASCH.

Reported. [1918] 1 Ch. 470. 34 Times L.R. 287. Journal, Vol. XXXIX, p. 114.

*Bills of Exchange payable in Germany—Recourse.*

THIS summons, in which Mr. Justice Younger delivered a considered judgment, raised a question of great importance to banks in England who discounted bills of exchange accepted in Germany or Austria which became due during the war.

Messrs. Francke and Rasch were a firm of coffee merchants in Fenchurch Street, and a large part of their business consisted in exporting coffee to firms in Germany and Austria. These firms paid for it by bills drawn on them by Francke and Rasch, and accepted by them, which were discounted with banks in London, and the proceeds were received by Francke and Rasch.

On February 15th, 1917, the business was ordered by the Board of Trade to be wound up under sec. 1 (1) of the Trading with the Enemy Amendment Act, 1916, and a controller was appointed. The winding up was nearly completed, and the controller was about to distribute the assets among the non-enemy creditors. Claims were made against the assets by Martin's Bank and Messrs. de Pury, Gautschi and Co., bankers, who held bills drawn by Francke and Rasch accepted in Germany which had been discounted by them and had not been paid, although the due date under the bills was past.

Martin's Bank held bills payable both in Germany and Austria which may be divided into two classes :—

(1) Bills which before the outbreak of war had been sent to the bank's agents in the enemy countries for collection, some of which were payable before the outbreak of war and some after. No evidence could be obtained whether any of these had been paid on presentment.

(2) Bills payable after the outbreak of war which were still in the bank's hands and had not been presented, though the dates of payments under the bills were past.

Messrs. de Pury, Gautschi and Co. held bills which fell under both these classes, but were all payable in Germany.

The controller issued a summons for the direction of the Court, and the banks submitted to the jurisdiction.

Evidence was given as to emergency legislation which had been passed in Germany during the war affecting the question. It appeared that ordinances had been passed which may be divided into three classes :—

(1) A series of ordinances beginning on August 7th, 1914, whereby no person residing outside Germany could enforce any pecuniary claims by proceedings in German Courts until dates which had been extended over the time of the issue of the summons.

(2) A series of ordinances beginning on August 10th, 1914, whereby the due date of all bills of exchange drawn outside and payable in Germany which had not fallen due before July 31st, 1914, was postponed for nine months, interest being payable at the rate of 6 per cent. per annum.

(3) An ordinance passed on September 30th, 1914, prohibiting payment or transmission of securities to persons in Great Britain or Ireland or any British territories. By sec. 2 the maturity of all pecuniary claims of persons residing in British territories was postponed until further notice from July 31st, 1914, or, in case of claims maturing at a later date, from such date, and no interest could be claimed in respect of the period of postponement. By sec. 4 in the case of bills held in British territories in respect of which the time for payment or for protesting for non-payment had not expired at the coming into force of the ordinance and which had not been protested, the time for presentment or protest was postponed until the ordinance had ceased to be in force. By sec. 8 the ordinance was to come into force on September 30th, 1914, and the Imperial Chancellor was to determine the date at which the ordinance was to cease to be in force.

Similar ordinances were subsequently passed in respect of residents in France, Russia, Italy, Portugal, and other countries at war with Germany, but not in respect of all such countries.

There was no evidence as to Austrian war legislation.

The banks claimed that they were entitled to be paid the amount of the bills at the notional rate of exchange at their due dates, with interest at the rate of 6 per cent. since such dates, or, in the alternative, at the notional rate of exchange on April 30th, 1915 (six months from July 31st, 1914), with interest at 6 per cent.

Mr. Justice Younger said that he would assume that Austrian war legislation was similar to that of German, and as there was no distinction between the bills held by Martin's Bank and those held by Messrs. de Pury, Gautschi and Co. he would in his judg-

ment treat Martin's Bank as the only claimants. The question was one of great importance to all banks who had discounted bills payable in enemy countries. As to bills which fell due before the outbreak of war there was no evidence and no reason to doubt that the proceeds were in the hands of the German agents and the claim failed from lack of evidence. As to the bills in Germany which fell due after the outbreak of war there was no evidence of dishonour and the bank could not complain if he treated these in the same way as the bills still in England. As to these bills the Solicitor-General contended that sec. 1, sub-secs. 3 and 4, of the Trading with the Enemy Amendment Act, 1916, did not apply to these claims, which ought to be rejected by the controller. The sub-sections only applied to the present debts and liabilities, and not to future liabilities. There was no provision analogous to sec. 206 of the Companies (Consolidation) Act, 1908, and no machinery for assessing the present value of future liabilities. These were reserved by the Act to be dealt with by the owners of the business when they became due, as he (Mr. Justice Younger) had held in *In re* Dieckmann (34 The Times Law Reports, p. 169). The bank's claim could only be admitted so far as it justified a present claim against the drawers. But their main claim was not affected by the statute. They claimed to recover money which they said the acceptors ought to have paid and had not paid.

The bills had not been presented, and under sec. 45 of the Bills of Exchange Act, 1882, presentment was necessary. The bank, however, said that presentment in Germany was not only difficult, if not impossible, but would be even criminal, as being intercourse with the enemy, and that presentment ought to be dispensed with under sec. 46 of the Act. He (his Lordship) thought that they were right and that it was not their business to obtain a licence for intercourse with the enemy, and that even if such intercourse had been permitted here it would not have been allowed in Germany. The main answer to the bank's contention depended on sec. 72 (5) of the Bills of Exchange Act, 1882, whereby the due date of payment was determined by German law and must be ascertained according to German emergency legislation.

[His Lordship then recapitulated the various ordinances which had been passed.]

In the result he held that by the ordinances affecting all persons in foreign countries no bills could now be enforced. The close time was continuing, and when the Courts were available interest at 6 per cent. would be payable either from the due date or from April 30th, 1915. The maturity of all bills held by residents in British territories was postponed until further

notice, and no interest was irrevocably forfeited. The interests of some enemy subjects were differentiated from other holders outside Germany. The due date of payment had not yet arrived.

It was said that the ordinance of September 30th was unobjectionable, except so far as it forfeited the interest. His Lordship, however, preferred to base his judgment on broader grounds, which would be good in all Courts. He would assume that the ordinance of September 30th must be read as a whole and as penal, and confiscatory legislation would not be recognized. It was one thing not to recognize, and another to ignore. The question was not whether the ordinance should be recognized, but whether the holders or the drawers were to suffer because of the existence of the ordinance. It was clear that the drawers gave no guarantee to the holders that the acceptors would pay at a time when they were not bound to do so. Was the fact that the war had supervened sufficient to reverse the position? He (his Lordship) could not think so. On the whole, he came to the conclusion that the bank's claim ought to be disallowed.

*Note.*—Although governed by temporary and exceptional conditions, this case may be useful as stating the principles applicable where bills are due for presentation in an enemy country.

For earlier case as to moratorium, see Rouquette *v.* Overmann (L.R., 10 Q.B., 525).

[IN THE COURT OF APPEAL.]

## LONDON AND PROVINCIAL BANK *v.* GOLDING.

Journal, Vol. XXXIX, p. 136.

*Collecting Postal Money Orders.*

THIS case draws attention to a liability incurred by banks in collecting Postal Money Orders which is not as widely realized as it should be.

When these documents are presented for payment by a bank they are paid without examination and without waiting for advice from the place of issue in cases where such advice is necessary. But the regulations of the Post Office give them the right at any subsequent period of returning Postal Money Orders to the presenting bank, should they be found irregular, and of deducting the amount from any payments due or which may become due to the bank. See Money Order Amendment (No. 2) Regulations 1908, No. 118, sec. 5 (2).

In the above case a Chinese, refused payment by the Post Office of Postal Money Orders remitted from abroad to this country, negotiated them to a customer of the London and Provincial Bank. The customer paid them to his account and asked the bank to advise him as soon as they were "all right." This the bank did as soon as they received the proceeds from the Post Office. Subsequently, however, some irregularity was discovered by the Post Office authorities and the orders were returned to the bank and debited to the account of the customer. Meanwhile the Chinese had left the country, and his whereabouts was unknown, the customer declined to be debited, and asserted that the bank, having informed him the orders were "all right," had lost their right of recourse against him.

Judgment was given in favour of the bank.

*Note.*—Some comment was made from the Bench on the bank officials not being acquainted with these Post Office regulations. The blame, if any, rather rests upon those responsible for the legislation and regulations governing this class of instrument. They are involved and misleading. Subject to reasonable doubt, the following would appear to be the resultant position. There are two classes of Postal Orders.

1. Postal Orders. These cannot be for more than a guinea each and are intended for home use.

2. Postal Money Orders. These may be for larger amounts and available either for home or foreign purposes.

Neither is now negotiable, the Currency and Bank Notes Act, 1914, sec. 1 (*b*), which made postal orders legal tender in the U.K. having been repealed by Proclamation as from February 3, 1915. Both can be crossed, but the crossing does not bring them within the Crossed Cheques sections. If crossed, they will only be paid to a banker; if stamped and presented by a banker, whether crossed or not, certain formalities are waived.

The Post Office regulation above referred to applies only to Postal Money Orders. With regard to Postal Orders, the Post Office Act, 1908, sec. 25, enacts that "a banker collecting a postal order or document purporting to be a postal order for any principal shall not incur liability to anyone but that principal by reason of having received payment of or presented such order or document for payment."

The group in which this section occurs is headed "Money Orders" but by sec. 24 it is confined to "Postal Orders," strictly so termed. There is no restriction to crossed Postal Orders in sec. 25.

As to "Postal Orders," the banker's position would therefore appear safe enough, both as against the Post Office and the true owner. But with regard to Postal Money Orders, at any rate, bankers should clearly point out to any customer who pays them in that if paid and credited, such payment and credit are provisional only, and that the account will be debited if the Post Office demand a refund. The bank's right so to debit is established by this case.

[IN THE KING'S BENCH DIVISION.]

## LINDSAY, GRACIE AND CO., LTD. *v.* RUSSIAN BANK FOR FOREIGN TRADE.

Reported. [1918] W.N. 177. Journal, Vol. XXXIX, p. 168.

*Payment in foreign currency.*

The plaintiffs shipped coal to one Boeckel, in Petrograd, for which sterling acceptances were given. These acceptances were not met, and it was arranged that roubles should be deposited with the Petrograd office of the defendant bank and that payment of the acceptances should be suspended. Later the London office of the bank informed the plaintiffs that the roubles had been credited to an account in London, and were at the plaintiffs' disposal in Russian currency.

The plaintiffs sought a declaration that the defendants were bound to discharge the liability by payment in Russian currency, that is to say in metal coin. The bank contended that Russian currency must mean any form of money that was legal tender in Russia. It was pointed out that beside the rouble notes issued by the late Imperial Government, there were in circulation the notes of the Kerensky Provisional Government and those of the Bolshevists, both of which were worth less than the Imperial notes. The Judge protested that the decision as to what at the present time was Russian currency, was really one for the Foreign Office to decide rather than a court of law. In his view, however, metal coinage was excluded and he ruled out the notes issued by the Bolshevist Government, which had never exercised authority over the whole country or received recognition here. He held that the defendants were bound to pay in London such a sum in English Treasury notes as was represented by the number of roubles they held at the plaintiffs' disposal, and for this purpose notes of either the Imperial or the Provisional Government were Russian Currency.

*Note.*—In stipulating that the payment was to be made in English Treasury notes, the Judge followed the doctrine consistently upheld in English law, that the Courts of this country have, generally speaking, no jurisdiction to order payment of money except in the currency of this country.

The analogous question of depreciated exchange was one of the most troublesome which arose during the war, and it was only after much fluctuation of judicial opinion that it was practically settled that, both in cases of tort and contract, the rate of exchange was to be that obtaining at the date of the accruing of the cause of action, not that of the judgment.

The cases are collected and fully dealt with in an article by Mr. J. H. Phillips in the Journal of the Institute, Vol. XLV., p. 35, January, 1924.

[IN THE HOUSE OF LORDS.]

## LONDON JOINT STOCK BANK LIMITED *v.* MACMILLAN AND ARTHUR.

Reported. [1918] A.C. 777. 34 Times L.R. 509. Journal, Vol. XXXIX, p. 236.

*Fraudulent Alteration of Cheque—Negligence of Drawer.*

THE facts of this case, as found by Sankey, J., and accepted by the House of Lords, were as follows :—

The plaintiffs, Messrs. Macmillan and Arthur, kept a banking account with the defendants, and had in their employment a confidential clerk named Klantschi. He had been with them for some years, and they had no reason to distrust him. They left to him the keeping of their books and the filling in of cheques for signature. On February 9th, 1915, one of the partners of the plaintiff firm, Mr. Arthur, was going to luncheon about midday and was leaving the office, when the clerk came to him and said that he wanted £2 for petty cash, and produced a cheque for signature. It was usual for the clerk to ask for the signature to a cheque for a small amount for petty cash, and on this occasion the cheque produced for signature contained no words in the space left for words, but the figures 2.0.0 were in the space left for figures. It was properly dated and was made payable to "ourselves or bearer" and uncrossed. Mr. Arthur, being in a hurry, signed the cheque in this condition, and the clerk added the words "one hundred and twenty pounds" in the space left for words and the figures "1" and "0" on each side of the figure "2," thus transforming it into a complete cheque for £120. He presented the cheque for payment, received the money, and absconded. On examination of his books a number of discrepancies were discovered. The plaintiffs brought this action *inter alia* for £118, the difference between the amounts of the cheque as authorized and as paid.

Mr. Justice Sankey gave judgment for the plaintiffs, and the defendants appealed. The Court of Appeal dismissed the appeal. The defendants appealed to the House of Lords, who unanimously allowed it. The judgments settle, in favour of bankers, questions of supreme importance and remove a long-standing and unjustifiable hardship.

The following judgments were delivered :—

The Lord Chancellor (Lord Finlay).—After a brief recapitulation of the facts his Lordship proceeded :—

"This House will accept the findings of fact of the learned Judge, concurred in as they were by the Court of Appeal. But his inference from the facts, that the plaintiffs were not guilty of negligence, stands in a different position. This is a matter of mixed law and fact, on which this House is bound to exercise its own judgment.

"The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. It has been often said that no one is bound to anticipate the commission of a crime, and that to take advantage of blank spaces left in a cheque for the purpose of increasing the amount is forgery, which the customer is not bound to guard against. I am unable to accept any such proposition without very great qualification. As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

The Lord Chancellor then reviewed exhaustively the case of Young *v.* Grote, decided by the House of Lords in 1827, of which he says :—

"Young *v.* Grote was decided nearly a hundred years ago. It has often been approved by many of our greatest judges, and with the exception of a recent case in the Privy Council, with which I shall deal later on, there has never been a decision inconsistent with it but for that now under appeal."

In another passage of his speech, which will be found later on, the Chancellor again expresses his full concurrence in the judgment in Young *v.* Grote. Dealing with the subsequent cases in which that judgment has been discussed, he differen-

tiates the case of Scholfield *v.* Londesborough ([1896] A.C., 514), concerning which he points out :—

"It is obvious that the position of the acceptor of a bill of exchange with reference to subsequent holders is very different from that of a customer with reference to his banker in the case of a cheque. In the latter case there is a definite contractual relation involving the obligation to take reasonable precautions. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory."

Dealing with the Privy Council case of Colonial Bank of Australasia *v.* Marshall ([1906] A.C., 559), the one he had described as the only case inconsistent with Young *v.* Grote, he dismissed it as an erroneous decision.

The Chancellor then proceeds as follows :—

"The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. If the existence in a cheque of blank spaces of an unusual nature and such as to facilitate interpolation is declared to be no evidence of a breach of duty as between customer and banker, the duty would have little left to operate upon. To recognize the duty of care by the customer in drawing cheques, and then to lay down as a matter of law that there is no breach of that duty by leaving such blank spaces in the cheque, is in effect to eviscerate the duty. If Young *v.* Grote is right the judgment now appealed from is wrong. In my opinion the decision in Young *v.* Grote is sound in principle, and supported by a great preponderance of authority, and must be treated as good law. The ground on which Young *v.* Grote proceeded was, according to the judgment of three out of the four Judges, simply this, that if a customer in drawing a cheque neglects reasonable precautions against forgery and forgery ensues, he is liable to make good the loss to the banker, and that the fact that a crime has to intervene to cause the loss does not make it too remote. Indeed, forgery is the very thing against which the customer is bound to take reasonable precaution. Leaving blank spaces in the cheque is the commonest way in which forgery is facilitated, and to lay down as a matter of law that it is no breach of duty would be a somewhat startling conclusion. In Young *v.* Grote there was the additional circumstance of the small 'f' at the beginning of the word 'fifty,' but I cannot doubt that without this the result would have been the same.

"In the present case the customer neglected all precautions. He signed the cheque, leaving entirely blank the space where

the amount should have been stated in words; and where it should have been stated in figures, there was only the figure '2' with blank spaces on either side of it. In my judgment there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If, owing to the neglect of such precautions, it is put into the power of any dishonest person to increase the amount by forgery the customer must bear the loss as between himself and the banker.

"But, further, it is well-settled law that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled up by his agent. This has been suggested as the real ground for the decision in Young *v.* Grote. For the reasons which I have already stated, I do not think that on the facts of that case it is the true ground of the decision. But the principle is thoroughly established, and it seems to me to apply to the facts of the present case. The customer signed the cheque in the condition which I have described and handed it over to the clerk to be filled up by him. For all practical purposes the cheque was in blank, as the figure '2' in its isolated position afforded no security whatever against a fraudulent increase. The clerk had the authority of the customer to fill up the words denoting the amount in the body of the cheque, and to put other figures before and after the '2' was quite easy owing to its position. The examination of the facsimile of the cheque when filled up shows how impossible it was to detect the fraud. On such facts the customer is liable for the act of the clerk, just as much as if the cheque had been completely in blank when he signed it and handed it to the clerk to fill it up. There was no apparent limitation on the authority of the clerk in filling up the cheque. On this ground also, which on my view of Young *v.* Grote is independent of that decision, I am of opinion that this appeal should be allowed.

" For these reasons I think that judgment should be entered for the bank, with costs here and below."

Viscount Haldane, after reviewing the facts, laid down the following rules as to the relation between banker and customer : —

" The customer contracts reciprocally that in drawing his cheques he will draw them in such a form as will enable the banker to fulfil his obligations and therefore in a form which is clear and free from ambiguity. The banker, as a mandatory, has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called upon to do."

He then proceeds :—

" What I wish to make plain is that in the case of a cheque drawn by a customer on his banker there is a special duty to exercise care in the framing of what is a mandate, a special duty which does not exist in the same fashion in the instance of the acceptor of a bill of exchange, where the instrument is drawn for circulation among the members of the public generally, and is not a direction to a designated person to pay out of a balance for which he has to account, a person who has a right to insist that the direction he receives, to be acted on without any delay, shall be so drawn as not to require exceptional consideration and so impose delay. The obligation of the customer to avoid negligence in this regard was, I think, well expressed by Mr. Justice Kennedy in Lewes Steam Laundry Company *v.* Barclay (11 Commercial Cases, 255), when that very accomplished Judge defined it as including a ' duty to be careful not to facilitate any fraud which, when it has been perpetrated, is seen to have in fact flowed in natural and uninterrupted sequence from the negligent act.' The limitation of the liability to that which flows directly from the act established as negligent was obviously introduced by Mr. Justice Kennedy because of what had been repeatedly laid down in the decided cases as essential, that the negligence should be of such a kind that the loss has resulted immediately from it, and not from some intervening cause, which, although it was able to produce its effect because of what the customer had previously done or omitted to do, was not itself brought into existence as the immediate and natural outcome of his action. Thus a man may be imprudent in leaving his cheque-book and pass-book in the hands of his clerk, who is thereby enabled to forge a cheque. But he is not liable; for this reason, that the direct and real cause of the loss is the intervention of an act of wickedness on the part of the clerk which the law does not call on him to anticipate in the absence of obvious ground for suspicion. In Kepitigalla Rubber Estates, Limited, *v.* National Bank of India, Limited ([1909] 2 K.B., 1010), Mr. Justice Bray states the principle with conspicuous lucidity."

Viscount Haldane then discussed the effect of sect. 20 (1) of the Bills of Exchange Act :—

"I think that a banker has more than one answer to his customer if he is challenged for paying a cheque which on the face of it appears to have been duly filled in before signature, although in fact it has really been filled in subsequently and otherwise than in accordance with instructions given by the customer to his clerk when he signed it and handed it to the latter to complete and cash, with a restriction on the clerk's authority of which the banker knew nothing. If the customer objects to be debited with the amount of such a cheque on the ground that the clerk has inserted an amount which was not authorized, the banker may reply either of two things. He may say that the customer was under a legal obligation to see that any cheque which he signed, in order that it might subsequently be filled in and presented, was in order when presented, and that the existence of this obligation precludes him from setting up that the clerk had not authority in fact. The presentation at the counter of a cheque for a definite amount which he authorized to be presented in order to be cashed, although he actually intended that it should be cashed for a different amount, is a representation that the bearer presenting it has authority to receive payment. The special duty of the customer towards his banker to which I have already referred is, in itself, a sufficient ground for attributing an intention to make such a representation, and I think that its inference may also be justified on the more general principle of estoppel by conduct enunciated by Baron Parke in the well-known case of Freeman *v.* Cooke (2 Ex., 663).

"My Lords, I have come to the conclusion that if the principles which I have now stated are applied in the present case we cannot avoid the conclusion that the decision in the Courts below was erroneous. The respondents signed a cheque which was blank altogether as regards the words which according to usage were to be inserted to describe the amount, and as to the figure space was in such a condition that the figure '2' was inserted in a place where other figures could easily be added on each side. They left it to their clerk to fill up the cheque thus imperfect. It was drawn payable to bearer, and he was authorized to present it for payment. On the face of the cheque there was nothing of any kind to awaken any doubt in the minds of the officials of the bank that the cheque, which it was their duty to honour if in order without delay, was in order. The bank paid the amount which it appeared to be drawn for over the counter in cash to the fraudulent clerk. Both upon the principles and upon the authorities I have referred to, it seems to me that the bank acted rightly in law in so doing. It was said in the judgments in the Court below that the insertion of the

figure ' 2 ' in the cheque before signature was a limitation on the face of it of the authority of the clerk, and that therefore the real cause of the loss was not the failure to tell the bank of the restriction on his power, but his own fraud for which the respondents were not liable. I cannot agree. So far as the bank was concerned no limitation of the amount appeared on the face of the cheque when presented. Before signature there was that which, if left alone, would have been such a limitation. But then the respondents left the clerk in a position to make additions to the cheque, which was not only in an imperfect condition, but had the limiting figure in such a place that the clerk could, by merely adding figures on each side, make it disappear as completely as if it had never been inserted. He did make additions which, when the cheque was presented at the bank, had rendered the original limiting figure for all practical purposes non-existent. It was immediately due to the action of the respondents and not to any other cause that he was able to do this, and I am of opinion that in putting as much as they did within his power they took the risk of failure in the discharge of their duty to the bank of which they were customers. It follows that they cannot now recover the amount of a loss which was due to their own negligence."

Lord Shaw delivered a judgment from which the following extract is taken :—

" The case must be taken as the simplest one, namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. My Lords, there are in these circumstances reciprocal obligations. If the cheque does not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and *ex facie* valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that, in the usual case, is met by the marking ' refer to drawer,' and by a delay in payment until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These obligations on the banker do not, of course, exist until after the cheque has been presented.

" Upon the other part there are obligations resting upon the customer. In the first place, his cheque must be unambiguous and must be *ex facie* in such a condition as not to arouse any reasonable suspicion. But it follows from that that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care

to frame and fill up his cheque in such a manner that when it passes out of his (the customer's) hands it will not be so left that before presentation, alterations, interpolations, etc., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequences of such negligence fall alone upon the party guilty of it—namely, the customer."

He expressed his entire agreement with the Lord Chancellor's narrative and conclusions upon the subject of the authorities from Young *v.* Grote downwards, adding: "I humbly think the case of 'Marshall' to be in conflict with the great and binding authority of 'Scholfield,' and I do not see my way to follow it."

Lord Parmoor also delivered judgment in favour of the appellants, based on the ground of estoppel rather than on any breach of duty between banker and customer.

Judgments below reversed, appeal allowed, and judgment given for the bank.

*Note.*—1. The above is probably the most important banking case for many years, carrying, as it does, the final and irrevocable authority of the House of Lords, and relieving bankers of a burden placed upon them by a series of erroneous judgments founded on one another and misapprehension of what should have been the governing principle and authority. When once the relation of the banker as mandatory and the customer as mandant; the absence of any such relation between acceptor of a bill and the indeterminate future holder; the fact that a cheque is the customer's mandate; and the tendency of human nature to yield to temptation to wrong doing were recognized, the conclusion became obvious and inevitable; those of the previous decisions which were not mere replicas of former wrong ones fell into line; the others, notably the extraordinary case of Commercial Bank of Australasia *v.* Marshall, with its misapplication of the perfectly sound reasoning of Scholfield *v.* Londesborough, were eliminated as wrongly decided; and the orthodox doctrine, enunciated, as Lord Finlay points out, nearly a hundred years ago, in Young *v.* Grote, emerges from a period of undeserved obloquy and criticism.

Of course, the cardinal point in the case is the unhesitating and categorical statement that it is the customer's duty, in drawing cheques, to take reasonable precautions to prevent those cheques being fraudulently manipulated, that the possibility of forgery must be present to the mind of the customer in estimating what are reasonable precautions, and that if, by breach of such duty, forgery is facilitated and committed, and the question of

loss arises, it is the customer, not the banker, who must bear that loss.

Perhaps the most aggravating of all the untenable arguments and reasons put forward during this protracted controversy was that which avowed that crime, and particularly forgery, was such an appalling thing that no man was bound to anticipate or contemplate it, whatever temptation he afforded for its commission: that when the, to ordinary minds, natural result occurred, the true legal view was that this was an unfortunate and exceptional lapse on the part of the criminal which no right-thinking man would dream of, that consequently the crime itself, not the affording facilities for it, was the direct cause of the loss, the negligence, if any, being too remote, and that therefore the loss must remain where it fell, namely, on the banker. One very eminent Judge emphatically declared that crime was a matter to be guarded against by the administration of the criminal law, not by the vigilance of the citizen.

Lord Finlay, in trenchant and common-sense language, above quoted, disposes of this pernicious fiction, adopting the keener insight of Shakespeare's

> "How oft the sight of means to do ill deeds
> Makes ill deeds done!"

2. It will be noticed that there is a second ground on which the House upheld the defence of the bank; some of the Law Lords made it almost the chief basis of their judgments. As demonstrated by Lloyds Bank *v.* Cooke ([1907] 1 K.B., 794), sec. 20, and the common law are supplementary of one another with regard to estoppels on bills, notes, and cheques.

Developed by the Macmillan case, the outcome is that, if a man lets loose on the world a stamped piece of paper bearing his signature, or a similar instrument whose inchoate or incomplete condition admits of its being utilized as a negotiable instrument, he is responsible thereon to any person who honestly takes or deals with it in its completed condition. In other words, he is estopped from denying to such person that the instrument was what it purported to be when the latter took it.

As indicated by the words used above, "developed by the Macmillan case," these propositions are somewhat of an advance on the previous conception of the limits and functions of such inchoate instruments.

One might have hesitated to apply sec. 20 in the Macmillan case as their Lordships do. Save in favour of a holder in due course, which the bank were not, the inchoate instrument must be filled up within reasonable time and strictly in accordance with the authority given, to be effective under that section. The whole section turns on authority, rebuttable except as

against the holder in due course to whom the instrument is negotiated after completion.

It is difficult to see how Arthur conferred any authority on the fraudulent clerk. His mind was not even a blank on the subject; he was told it was for petty cash and that two pounds would be sufficient, that being the sum appearing thereon in figures. The authority to fill in for £120 is not very apparent; and the case in this respect seems somewhat difficult to reconcile with Smith *v.* Prosser ([1907] 2. K.B., 735).

Lords Finlay and Shaw adopted the somewhat heroic line of treating the instrument, when it left Arthur's hands, as a blank cheque or a very near approach thereto, but even then the question of authority seems doubtful. It was hardly a case analogous to Garrard *v.* Lewis (10. Q.B.D., 30), where a marginal note on a bill was not admitted to control the amount formally expressed in the body thereof.

But the House of Lords is the final and absolute exponent alike of statute and common law and its pronouncements are not to be gainsaid or reconsidered.

The common law estoppel was formerly held to be confined to the transferee of a completed instrument, being based on the exigencies of negotiability, though the element of authority was not so circumscribed a factor as under the Act. Now the formula, whether under statute or common law, emerges from the House of Lords in the broad and salutary proposition that the handing an in fact inchoate instrument to another person, for the purpose of negotiation or getting money, involves authority to complete it, negotiate it or get the money on it, whether the signatory knows it is incomplete or not.

Bankers may rest quite content with the eminently satisfactory result of the case, whether arrived at by way of the duty of the customer, the Bills of Exchange Act, or common law estoppel.

3. The Macmillan case embodies some incidental pronouncements of definite value to bankers. It affirms, as has been seen, that it is part of the contractual relation that the customer shall issue and the banker receive his mandate, contained in the cheque, in plain, unmistakable terms: in a form which is clear and free from ambiguity; that the banker has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called upon to do.

It is possibly in consequence of the previous lack of any such definite declaration of their rights on this point that bankers have submitted to the imposition of unauthorized divergences from the normal form of cheque, the account payee crossing, the attached receipt form in its various developments and the like. No combined or even independent effort seems, however, to have been made by banks to assert the right established by

this judgment: the five years which have elapsed since its delivery have seen an increase and acquiescence in these cheque aberrations, and it might be difficult now to assume a new attitude.

4. The question of delegation of authority bulked large in cases prior to the Macmillan case. It was one of the stock arguments, often received with approval, that a man was justified in reposing implicit confidence in a supposedly honest clerk, was not negligent in so doing and not responsible if the clerk abused that confidence. It was the same Utopian idea as the remoteness of the possibility of crime.

But Lord Finlay dispelled the former illusion as bluntly as he did the latter. As quoted above, he said:—

"It is true that he implicitly trusted the clerk to whom he handed the document in that state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn. He owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks whom the employer believes to be honest. It is a specific duty as to the preparation of the order upon the banker. If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw on the banker the loss which results."

This is very different from the vague suggestion of Erle, C.J., that there is such a thing as negligence by unreasonable trust, or the *dictum* of Mathew, J., "Supposing the plaintiff had told the clerk who, it was suggested, had forged the cheque, to examine the pass-book and compare the returned cheques with it and the counterfoils, would the bank have any right to complain?" (Chatterton *v.* London and County Bank, The Times, January 21st, 1891).

That was said in a pass-book case, but it is not too much to hope that, even in that class of cases, the more intelligent views of the Macmillan case as to delegation of duty, closely akin to the American ones, may some day be adopted, with possibly a recognition of some duty on the part of the customer himself, hitherto ignored.

The Macmillan case dealt with a single cheque, so that no point arose therein as to the pass-book, or the principle of adoption; but incidental *dicta* may be found therein which may have a useful bearing in both connections.

A useful and artistic supplemental summary of the respective contractual duties of banker and customer will be found in the judgment of Atkin, L.J., in Joachimson *v.* Swiss Bank Corporation ([1921] 3. K.B., 110, at p. 127, *post*, p. 236).

[IN THE COURT OF APPEAL.]

## GUARANTY TRUST CO. OF NEW YORK *v.* A. HANNAY AND CO.

Reported. [1918] 2 K.B. 623. 34 Times L.R. 427. Journal, Vol. XXXIX, p. 242.

*Foreign Bill of Exchange with Forged Bill of Lading attached—Liability of Person Presenting the Bill for Acceptance.*

THIS was an appeal from the judgment of Bailhache, J., in favour of the defendants, reported in the Journal of the Institute, Vol. XXXVIII, p. 290. It raised questions of very great importance to bankers and the commercial world. The facts of the case as stated by Bailhache, J, and adopted by the Court of Appeal, were as follows :—

"On February 1st, 1910, the defendants, who are cotton brokers at Liverpool, bought of Messrs. Knight, Yancey, and Co., who were shippers of cotton, carrying on business at Decatur, Alabama, through the Cotton Commission Company, 1,000 bales of cotton on c.i.f. terms. The contract is in writing and one of its clauses : 'Reimbursement by shippers' drafts on the Bank of Liverpool (Limited), payable London at 60 days' sight for invoice amount. The buyer guarantees the due protection of the drafts on presentation and payment at maturity.' It is agreed that under the form of contract it was the duty of the defendants, on the arrival of the documents, viz. the draft, the bill of lading, the policy or certificate of insurance, and the invoice, at Liverpool, to procure the acceptance of the draft by the Bank of Liverpool if on examination the documents proved to be in order. In pretended part performance of this contract the shippers purported to hand to the Louisville and Nashville Railway Company for carriage to Liverpool 100 bales of cotton and to procure a through bill of lading therefor dated February 10th, 1910. By the terms of the bill of lading the cotton was deliverable to shippers' order, Liverpool, England. The bill of lading was a forged document and the shippers were the forgers. On the same day Messrs. Knight, Yancey, and Co., drew on the Bank of Liverpool a draft for £1,464 9s. at 60 days' sight for the contract price of the 100 bales of cotton.

The draft is set out in paragraph 3 of the Statement of Claim and runs thus: 'Sixty days after sight of this first of exchange (second unpaid) pay to the order of ourselves Fourteen hundred and sixty-four pounds and nine shillings value received and charge the same to account of 100 R.S.M.I. bales of cotton.' The points to be noted are that the draft contained in the margin the date of the sale contract and a reference to the quality of the cotton, 'F.M.T.' (fair middling tinged), and that it had in the body of the document the words 'value received and charge the same to account of 100 R.S.M.I. bales of cotton.' The letters R.S.M.I. were found to be the marks upon the bales. The draft was endorsed by Knight, Yancey, and Co., as also was the bill of lading.

"As no question arises in this case with reference to the certificate of insurance or the invoice I make no further mention of them.

"Messrs. Knight, Yancey, and Co., delivered the draft and bill of lading to their bankers, the First National Bank of Decatur.

"They then proceeded to sell the draft in New York. To this end they employed a broker there, Mr. Frederick Van Gerpen, who had acted as their broker for some years and in many transactions of the like nature. The *modus operandi* in all these transactions was the same as in this instance and was as follows:—Knight, Yancey, and Co. telegraphed to Van Gerpen instructions to sell the draft. He went into the market and found a buyer, in this case the plaintiffs, whose business is the buying of foreign exchange. This, as I understand, means the purchase at their present value of drafts payable at a future date in a foreign country. In order to obtain immediate payment for the cotton and to enable Mr. Van Gerpen to effect the sale of the draft on the Liverpool Bank and make delivery of the documents in New York, Messrs. Knight, Yancey, and Co. drew upon Mr. Van Gerpen on February 10th, 1910, a draft payable to the cashier of the National Bank of Decatur. The draft on Van Gerpen was discounted by the Decatur Bank, and Knight, Yancey, and Co. were credited with the proceeds. The Decatur Bank sent the draft on Van Gerpen together with the draft on the Liverpool Bank, with the shipping documents attached, to their New York agents, the Hanover National Bank. Mr. Van Gerpen paid this bank the amount of the draft upon him and received the documents from the bank on February 14th, 1910, handed them to the plaintiffs, received a cheque for the price of the draft, and advised Messrs. Knight, Yancey, and Co. of what he had done, and this part of the transaction was complete.

"These details are unnecessary except to emphasize the fact that Van Gerpen and the plaintiffs are dealers in exchange and

not in cotton. Mr. Max May, one of the vice-presidents of the plaintiff company, said in evidence in America: 'Our company does not buy and sell cotton. It deals exclusively in bills of exchange. When we buy a bill of exchange with documents attached, whether warehouse receipts or bills of lading, the documents serve as temporary security until the bill of exchange is accepted by the bank drawn upon.'

"The plaintiffs, having bought the bill of exchange, sent it with the bill of lading to Liverpool for acceptance under cover of a letter to the Bank of Liverpool dated February 15th, 1910, which, so far as is material, runs: 'We beg to enclose for favour of your procuring acceptance and transmitting for our account to the Guaranty Trust Company of New York, 33, Lombard Street, London, the bills noted at foot. In case of refusal to accept we will be obliged by your having the bills noted and communicating with our London office respecting them.' Then follows a list of bills including the one in question.

"The Bank of Liverpool had an arrangement with the defendants under which they accepted as agents for the defendants and on their behalf drafts such as the present upon business terms, and on receipt of the documents from America the Bank of Liverpool sent their usual communication to the defendants requesting them to call and inspect the documents at once so that the draft, if in order, might be accepted without delay.

"The defendants called, inspected the documents, found them to be apparently in order, and instructed the bank to accept the draft by letter of February 23rd, 1910. Up to this time the bill of lading had been physically attached to the draft. Upon acceptance the Bank of Liverpool detached and kept the bill of lading, and under cover of a letter of February 24th, 1910, sent the draft, now duly accepted, to the plaintiffs' London house as instructed. The acceptance was sold by the plaintiffs, passed through one or two hands and ultimately (on April 27th, 1910) the Bank of Liverpool honoured their acceptance by payment to the London City and Midland Bank, the then holders. Some suspicions had been aroused as to the genuineness of the bill of lading before the acceptance fell due, and Hannays instructed the Bank of Liverpool not to pay this bill, but the Bank of Liverpool felt themselves unable on that account to refuse payment. Having paid, they debited the defendants with the amount, with the result that on this particular transaction the defendants have lost £1,464. I regret to say that this is only one transaction, that there were many of the same class, and the total losses have been very large."

The judge gave judgment for the defendants.

The Guaranty Trust Co. appealed.

The Court of Appeal unanimously allowed the appeal and gave judgment for the Guaranty Trust Co.

In the course of his judgment, Pickford, L.J., said :-

"The appeal in this case arises out of some extensive cotton frauds committed by a firm of Knight, Yancey, and Co., of Decatur, Alabama. The particular transaction in question is a pretended sale of 100 bales of cotton by Knight, Yancey, and Co., to the defendants in this action. The 100 bales were a part of a quantity of 1,000 bales sold c.i.f. Liverpool to be paid for by the seller's drafts upon the Bank of Liverpool. The plaintiffs became holders of the draft to which was attached a bill of lading for the 100 bales, and presented it to the Bank of Liverpool for acceptance. The bank accepted the draft, retaining the bill of lading, and paid the money on the due date to the London City and Midland Bank, who had become holders of the document after acceptance. The bill of lading had been forged by Knight, Yancey, and Co., and no cotton had been shipped by them as described in it, or as corresponding to the description of cotton in the bill of lading. The defendants repaid to the Bank of Liverpool, who had accepted the draft by agreement with them, the amount paid by them, and then sued the plaintiffs to recover the amount on grounds afterwards to be mentioned.

"The first question is whether the defendants can recover this money assuming the case to be governed by English law. I agree with Bailhache, J., that the document was by English law a bill of exchange and negotiable, and that neither the draft nor the acceptance was conditional according to our law. Assuming this, the defendants contend that they are entitled to succeed on one or all of the following grounds : (*a*) that the plaintiffs warranted the genuineness of the bill of lading, (*b*) that they represented that it was genuine, (*c*) that they undertook to indemnify the defendants if it were not genuine, (*d*) failure of consideration which entitled the defendants to recover the money as moneys had and received by the plaintiffs to the use of the defendants or paid by the defendants to the use of the plaintiffs at their request, (*e*) a mistake of fact by both parties which induced the bank as the defendants' agents to accept the bill. Mr. Justice Bailhache held that both on principle and authority all these grounds of claim failed, and I agree with him."

As to points (*a*), (*b*), and (*c*), the Lord Justice held that there was no authority, representation, or agreement to indemnify involved in the presentation for acceptance of the bill with the forged bill of lading attached. He cited the cases of Leather *v.* Simpson, L.R. 11, Eq. 398, and Baxter *v.* Chapman, 29 L.T.,

642, which were directly in point. He said: "I doubt if the presentation of the draft for acceptance was a request by the plaintiffs to the bank at all; it may well be only an inquiry as to whether they were going to perform the contract of their principals with Knight, Yancey, and Co. by accepting the draft.

"The position of the holder of a bill of exchange who presents it for payment is I think well expressed in a lecture by Dean Ames, of Harvard, in 4 Harvard Law Review, 297, where he says: 'The attitude of the holder of a bill of exchange who presents it for payment is altogether different from that of a vendor. The holder is not a bargainer. By presentment for payment he does not assert, expressly or by implication, that the bill is his, or that it is genuine. He in effect says: Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money or protest it for non-payment.'

The Lord Justice said that the statement made by Mr. Justice Chambre in the old case of Smith *v.* Mercer, 6 Taunt., 83, that the holder warrants the genuineness of the bill by presenting it was expressly repudiated by Littledale and Bayley, JJ., in East India Company *v.* Tritton, 3 B. and C., 280, and continues:—"Dean Ames is no doubt in the passage quoted speaking of the question of whether there is a representation as to the genuineness of the bill of exchange, but I think the statement as to the position of the holder in such a case applies equally to the question whether there is a representation as to the bill of lading. But, if it were a request, it was only a request to them to perform the contract of their principals and such a request did not impose any liability upon the plaintiffs. It was not in any way such a request as those in the cases of Sheffield Corporation *v.* Barclay and Bank of England *v.* Cutler. These were cases where requests were made to bodies bound by statute or otherwise to comply with such request. I can see nothing in the circumstances to afford evidence of warranty or representation or agreement to indemnify."

As to (*c*), failure of consideration, Pickford, L.J., said:—"The head of failure of consideration raises very much the same point. There was no intention that any consideration should in the circumstances pass from the plaintiffs to the defendants, and I think this part of the case is concluded by the case of Robinson *v.* Reynolds, 2 Q.B., 196. I think that the same authority practically disposes of the contention of mistake of fact in the contract of acceptance.

"There remains, however, the question of how far the case is affected by American law. If the document be an unconditional order and acceptance and so a negotiable instrument,

it is not contended that American law applies to the case, and indeed such a contention would be useless, since American law in that case is the same as our own. Springs *v.* Hanover National Bank, 209 N.Y., 224, and cases there cited. But it is contended by the defendants that the meaning of the draft must be ascertained according to American law, as it was issued in America, and that when its meaning has been so ascertained it is shown to be only a conditional order and therefore not a negotiable instrument. To support that contention they refer to the Bills of Exchange Act, 1882, sec. 72, which is in these terms." His Lordship read the section, and proceeded :—" The argument for the defendants proceeds upon the ground that one requisite of form is that there shall be an unconditional order, that this depends upon the meaning of the words used as governed by the law of the place of issue, and that in America the meaning of the words is such as to make the order conditional. The plaintiffs contend that on the true construction of sec. 72, subsecs. 1 and 2, the meaning of the draft is to be ascertained according to English law, and that American law does not apply.

" The construction of this section is difficult. See Dicey, Conflict of Laws, 2nd ed., 588, 593, referring to Story on Bills of Exchange, 143, 152, and Chalmers on Bills of Exchange, 6th edit., 244, which is the 7th edit., page 260. But I will assume, without deciding, that the question whether the draft is conditional is to be answered according to American law.

" In view of the conclusion at which I have arrived in the case, the question of whether the draft and acceptance were conditional or unconditional is immaterial; but considerable argument was addressed to us on the point, and, therefore, I think it well to express my opinion upon it.

" According to the contention of the defendants' counsel the condition is to be found in the words ' charge the same to account of 100/R.S.M.L. bales of cotton,' and mention of the sale, date, and quality of the cotton, in the margin. This they say should be read as meaning not pay to the order of ourselves out of the proceeds of the cotton mentioned—this meaning they expressly disclaimed—but pay to the order of ourselves, provided that the bill of lading of the cotton mentioned herein is genuine and represents actual cotton; and this must be found in the terms of the draft itself, which it may be noticed does not mention the bill of lading at all."

After reviewing at length the American cases, Pickford, L.J., states his conclusion that the draft is unconditional in American as well as in English law. He then proceeds :—

" But I must deal also with the plaintiffs' contention that, assuming this draft to be conditional, the defendants have

proved no right to recover from the plaintiffs the amount they paid to the bank. Assuming the draft to be conditional, two positions are possible: (1) The document, whether before or after acceptance, was never a bill of exchange or negotiable, and the bank therefore could have defended an action by the London City and Midland Bank on any ground that would have been available against Knight, Yancey, and Co. (2) Although conditional by American law it must, by virtue of the proviso contained in sec. 72, sub-sec. 1 (*b*), of the Bills of Exchange Act, be taken as unconditional and negotiable as between the acceptor and any subsequent holder in England. In the former of these two positions there is considerable force in the plaintiffs' contention, that as the bank chose to pay without any liability and after being directed by the defendants not to do so they were not entitled to indemnity from the defendants, and the defendants cannot make any claim to be reimbursed their payment to the bank, because it was voluntary. But, in my opinion, either in the case of the bank's non-liability or liability the defendants have no claim against the plaintiffs. The money was not paid to the plaintiffs, and therefore in order to recover the defendants must, as it seems to me, base their claim on a warranty that the bill of lading was genuine, an agreement to indemnify the bank if it were not, or a request by the plaintiffs upon which the defendants paid the London City and Midland Bank.

"There is no express warranty, representation, agreement to indemnify, or request to pay, and if any one of these things is to be established it must arise by necessary implication from the circumstances of the transaction between the plaintiffs and the bank which took place in England. Whether there be such an implication is a matter to be decided according to the law of England, and in the earlier part of this judgment I have expressed my opinion that no such implication arises from the circumstances of the case.

"In any event, therefore, I think that the defendants cannot recover, and that the appeal should be allowed, the declarations asked for by the plaintiffs made, and judgment given for them on the counterclaim. The plaintiffs must have the costs here and below."

Warrington, L.J., in the course of his judgment, said:—"I will first consider the case on the assumption that the draft was a bill of exchange in the proper sense, *i. e.*, a negotiable instrument. The plaintiffs receive from the drawer the bill of exchange with the bill of lading attached. They are the endorsees of the bill and have become so for value and in due course. They then present the bill to the drawee for acceptance. The

consideration for the acceptance moves from the drawer to the acceptor, not from the endorsee, even in a case where the endorsee requests the drawee to accept (Robinson *v.* Reynolds). That is to say, the drawee accepts the bill, not in performance of any new engagement made between him and the endorsee, but by virtue of the arrangement he has with the drawer. But in truth the plaintiffs did not request the bank to accept; they only desired to know whether the bank would acknowledge their liability to do so and perform it or not, with an intimation that in the latter case a well-known step would be taken. It is quite clear that in such a case there is no warranty of the genuineness of the signature of the drawer. I can see no ground on which any such warranty should be implied as to the bill of lading." And he refers to Leather *v.* Simpson, with which he entirely agrees.

He says further:—" In my opinion if the draft be a bill of exchange, there is no such warranty as alleged.

" But suppose it be not, that is to say, suppose it is a conditional order to pay and therefore not negotiable, and suppose the condition to be that the bill of lading is genuine and that the goods have been shipped, I really fail to see how it would affect the question. The consequences of non-negotiability would be that the holder would be in the position of an ordinary assignee holding subject to any equities between the parties to the original contract, and if the drawer could not require payment unless he gave the acceptor the goods, the holder could not do so either; but this is not a circumstance leading to the inference of an implied warranty that the drawer has performed or will perform his obligation; if anything there is less ground for implying the warranty in the case now under consideration than in the case of a negotiable instrument, inasmuch as the acceptor is in a stronger position as regards the holder than if the draft were negotiable, for he is not bound to pay even a *bonâ fide* holder if the drawer's contract with himself is broken."

The Lord Justice also reviews the American cases and concludes that they show the law to be the same as our own in the matter.

Scrutton, L.J., prefaced his judgment with an interesting review of the commercial use of documentary bills, mentioning incidentally with regard to produce or commodity bills which purport on their face to be founded on commercial transactions, such as the bill in the present case, that a witness of the plaintiffs found that in 23,000 bills in a period of five years 93 per cent. were of this nature, bearing on their face " pay and charge same to the account of " certain specified commodities or words to the like effect.

He agreed with Warrington, L.J., that so far as warranty was concerned, it made no difference whether the draft was conditional or unconditional.

He also formulates the position of the holder of a bill who presents it for acceptance as follows :—

"It is agreed that the exchange house by presenting the bill of exchange for acceptance does not warrant the genuineness of the drawer's signature; that is the concern of the acceptor to verify; it is curious if, not warranting this, it yet warrants the genuineness of the documents attached to the bill, about which it can know much less than it may know about the bill itself. The position of the exchange house seems to be :—'Here is a bill which I am told to ask you to accept under some contract to which I am not a party; will you accept it? If you do, I am told by the vendor to hand you documents under his contract, which at present I hold as security for my loan to him; if you do not, I can deal with my security and you cannot get the documents from the vendor.'" And he supports this view by reference to the earlier cases, specially Leather *v.* Simpson, above referred to, where the discounting bank sent forward not only a bill for acceptance drawn in the form 'pay and place to account 251 bales of cotton *per* William Cummings,' but also a memorandum 'the bank holds bill of lading for 251 bales of cotton *per* William Cummings,' and it was held that when the bill of lading turned out to be a forgery the acceptor could not recover from the bank the money he had paid them on the acceptance.

He also decided that any American law bearing on the question was identical with English law.

As in the case of the other Lords Justices, this obviated any decision as to the effect of sec. 72, and Lord Justice Scrutton makes no definite pronouncement as to its possible bearing on the case. What he said was as follows :—"I have come to the conclusion that both by English and American law this was an unconditional order to pay. This renders it unnecessary for me to express a final opinion on a point on which I feel great difficulty, the true meaning of sub-secs. 1 and 2 of the English Bills of Exchange Act, especially as to the exact extent of application of sub-sec. 1 (*b*). It would be curious if an American bill, differing from the English form, were valid by the English law for enforcing payment and invalid in a suit to recover a payment which had been made under it."

Appeal allowed. Judgment for the Guaranty Trust Co. with costs there and below.

*Note.*—To avoid confusion, it may be well to explain how the Guaranty Trust Co. came to figure as plaintiffs in this case.

Originally commenced in America with Hannay and Co. as plaintiffs and the Guaranty Trust Co. as defendants, although all the relevant facts occurred in this country, it was in the first instance decided there against the Guaranty Trust Co., then the defendants. The United States Circuit Court of Appeals reversed this judgment on the ground that the case was governed by English law and that the trial judge had disregarded the evidence given before him of what the English law was. They granted a new trial, the American procedure not permitting their entering judgment for the then defendants.

The Guaranty Trust Co. then sought to transfer the proceedings to this country by instituting an action here claiming declaration of their rights and an injunction restraining Hannays from proceeding further in the matter in the American courts. This was opposed by Hannays, but, after some litigation, acquiesced in, Hannays reproducing their original claim by way of counterclaim. The new trial ordered in America was dropped and the case instituted by the Guaranty Trust Co. came on before Bailhache, J., the Guaranty Trust Co. being plaintiffs, Hannays defendants and counterclaimers. A special jury found there was no warranty. It was a question whether this was a matter for them or the judge, and the case went on on the latter basis.

Then Hannay and Co. amended their pleadings and raised the question of sec. 72.

On the issue thus set up, which the Court of Appeal subsequently held entirely irrelevant to the subject matter of the action, Bailhache, J., directed an inquiry in New York as to the American law. This resulted in a direct diversity of evidence, preponderating in favour of the Guaranty Trust Co. Faced with this, Bailhache, J., reverted to an earlier decision on demurrer in the case by Judge Noyes, which was to the effect that the bill was conditional by the law of the American States which governed it; and adopting that view and acting on an impression, shown in the Court of Appeal to have been unfounded, that counsel on both sides had admitted that if such were the case, the Guaranty Trust Co. could not succeed, he gave judgment for Hannay and Co.

The case being a test one, involving very large interests, naturally could not be left there, and the Guaranty Trust Co. appealed. As has been seen, the Court of Appeal unanimously allowed the appeal, and judgment was entered for the Guaranty Trust Co. on both claim and counterclaim, with costs in both courts.

The main points to be noticed in the judgments are as follows:—

1. The person presenting a bill of exchange, whether for

acceptance or payment, neither warrants nor represents the genuineness of any of the prior signatures thereon or anything with reference thereto.

Prior to this decision, there had been expressions of doubt as to this, even by Sir Mackenzie Chalmers in his earlier editions. The grounds adduced for these conclusions and the exposition of the true relationship of holder and drawee exclude any question of consideration or failure of consideration as between drawee or acceptor and holder of a bill.

2. If documents, such as a bill of lading, are annexed to the bill and tendered with it on presentment, either for acceptance or for payment, there is no warranty or representation by the holder as to the genuineness of such documents or that the goods they purport to represent in fact exist and no undertaking to indemnify the acceptor if the documents are forged or the goods fictitious.

3. It was almost superfluous for the Court to declare the bill in this case to be unconditional by English law. There could hardly be a clearer example of an unconditional order combined with an indication of a fund for reimbursement or a statement of the transaction giving rise to the bill, as authorized by sec. 3 (3).

4. The conclusion that American and English law were identical on this point and the fact that no money had been paid either by Hannays or the Bank of Liverpool to the Guaranty Trust Co. absolved the court from the necessity of adjudicating on sec. 72. The remarks of Pickford and Scrutton, L.JJ., on the subject will be found above.

What would have happened had the bill been conditional by the law of its place of issue, been held by the Guaranty Trust Co. till maturity, presented for payment by and paid to them, or if the London City and Midland Bank had been sued by either the Bank of Liverpool or Hannays, remains therefore a question at large.

It seems ridiculous to suppose that if payment had been refused, the holder could have recovered from the acceptor, as admittedly he could have done, and that the acceptor could then have recovered the money back from him; but this *reductio ad absurdum* derives no support from the judgments, though Scrutton, L.J., admits its cogency.

The following are the only possible solutions which suggest themselves :—

(1) Section 72, 1 (*b*) in the right to sue implies the right to keep the money. The section speaks somewhat broadly of "the rights, duties, and liabilities of the parties to the bill."

(2) The payment is in this country on an instrument negotiable by the law of this country; consequently not recoverable.

(3) The bill is English *ab initio*. Prior to the Act, in *in re*

Marseilles Co., 30 C.D., 598, the court held that if a man abroad chooses to draw and issue a bill on England, in English form and in English, that bill is to be treated here as English from its inception and for all purposes.

5. It will have been noticed that in this case Hannays had authorised Knight, Yancey, and Co. to draw on the Bank of Liverpool and had arranged with that bank for their acceptance of the drafts.

The bank notified Hannays of the presentment for acceptance of this particular draft and the documents accompanying it. Hannays called, inspected draft and documents and instructed the bank to accept. They did so, retaining the documents.

Doubts having arisen as to the genuine character of the latter, Hannays wrote to the bank, telling them to refuse payment on presentation for payment. This course they refused to adopt; as Pickford, L.J., says:—"The bank, however, declined to dishonour their own acceptance."

In his judgment, as cited above, the Lord Justice says:—"Assuming the draft to be conditional, two positions are possible. (1) The document, whether before or after acceptance, was never a bill of exchange or negotiable, and the bank therefore could have defended an action by the London City and Midland Bank on any ground that would have been available against Knight, Yancey, and Co. . . . In the former of these two positions there is considerable force in the plaintiffs' contention that as the bank chose to pay without any liability and after being directed by the defendants not to do so they were not entitled to indemnity from the defendants, and the defendants cannot make any claim to be reimbursed their payment to the bank, because it was voluntary."

The Lord Justice's words may probably be read as mere appreciation of a plausible answer to an untenable proposition, and so of not much weight.

It can hardly be that he countenanced the view that a customer who, under agreement, has definitely instructed his banker to accept, in his own name, a specific bill, on that customer's account, can, after the banker has so accepted it, order the banker not to pay, and if, despite such order, the banker does pay, refuse to be debited, should events prove that the banker was not liable.

It is not like stopping a cheque; there the banker has no personal liability.

But, even with cheques, where one has been marked by the banker at the instance of the customer, banking opinion holds, and rightly, that the authority to pay cannot be withdrawn.

It is not like bills accepted payable at a banker's; there again the banker is a mere agent and under no personal responsibility.

But, once the banker has accepted in his own name, his agency is supplemented by an interest, legal, moral, and professional, which precludes withdrawal of authority to his detriment.

There may be defences which would have been available to the customer if he had been drawee and refused to accept which are not open to the banker who has accepted.

As Scrutton, L.J., says in this very case :—"It does not follow, because the drawee is not bound to accept unless a condition is fulfilled, that, when he has accepted, his transferable or negotiable promise to pay is not unconditional. It turns on the terms of his promise to pay."

Failure of consideration founded on a promise by drawer to drawee would be an instance of this sort; so would any bill conditional by the law of its place of issue but coming within sec. 72 (1) (*b*).

Or the bank may be faced with an intricate question of law or fact on which it may have no time or facilities for coming to a definite conclusion before the bill is presented for payment.

If the Bank of Liverpool had acceded to Hannay's request and not paid, they would have been liable to the London City and Midland Bank under sec. 72 (1) (*b*) or the ultimate decision in this case.

There may possibly be cases, say of pretty evident forged endorsement, where the bank, in concert with the customer, might reasonably hesitate to pay.

But, considering what a serious step it is for a bank to refuse payment of its own acceptance, bankers could hardly be expected to accept an arbitrary rule that they are compelled to do so on the customer's mere motion, under penalty of not being able to debit him if it ultimately turned out that they might legally have been justified in so doing by virtue of circumstances or legal subtleties outside their own knowledge or power of investigation.

It may have been noticed that the law of only two American States, Alabama and New York, came under review in this case. But in view of the almost general adoption throughout America of legislation co-ordinate with our Bills of Exchange Act, it does not seem probable that the question of conditionality of American bills in similar terms will be again raised in this country. It may be added that, since the Knight, Yancey frauds, which occasioned enormous losses, steps have been taken in the cotton States to minimise the risk of forgery of through bills of lading which involve railroad and ocean carriage.

[IN THE HOUSE OF LORDS.]

## BANBURY *v.* BANK OF MONTREAL.

Reported. [1918] A.C. 626. 34 Times L.R. 518. Journal, Vol. XXXIX, p. 260.

*A Bank's Liability for Advice upon Investments given by a Branch Manager.*

THIS was an appeal from a judgment of the Court of Appeal reversing a judgment of Darling, J. The facts were as follows :—

In 1912, the appellant, Captain Banbury, was travelling in Canada looking for profitable investments. Having arrived at Victoria, B.C., he called at the local branch of the Bank of Montreal, of which he had previously become a customer, and presented a letter of introduction which he had been given by the general manager, Sir Edward Clouston, when visiting Canada in the previous year. The letter was as follows :—

"*July 6th,* 1911.

"Dear Sirs,—I take pleasure in introducing to you Captain Banbury, of London, England, who is visiting this country on pleasure. Should he apply to you for assistance or advice, you will be good enough to place yourselves at his disposal.

"Yours faithfully,

"E. S. CLOUSTON, *General Manager.*

"The Branch Managers, Bank of Montreal."

The plaintiff's evidence was that he was advised by Mr. Galletly, the local branch manager at Victoria, to invest $125,000 in a loan on mortgage to the Westholme Lumber Company of British Columbia to assist it in performing a contract for the supply of water to the city of Victoria. He did so, but owing largely to the failure of the city authorities to find further moneys, the investment turned out a heavy loss, and he brought this action for damages for negligence by Galletly in not warning him that the investment was highly speculative. Alternatively he said that the defendants did not invest his money on mortgage as arranged, but allowed part to be used to pay off another mortgage already given by the Lumber Company to Messrs. Leiser and Co., of British Columbia.

The defendants said that Galletly had not given the plaintiff any advice, but merely supplied him with information as to the Westholme Lumber Company, and that he exercised his own judgment in making the investment. If, however, he had given the plaintiff such advice, he was acting outside the scope of his authority as manager of a branch bank, and the defendants were not liable for anything that he had done. In any case, any such advice was given honestly and in good faith. They also set up the defence of Lord Tenterden's Act, 9 Geo. IV., c. 14.

The jury found that the branch manager had authority as such manager to advise the appellant to make the investment, and was negligent in advising him to make it, and they awarded the appellant damages to the amount of £25,000, for which judgment was given. The bank appealed, and the Court of Appeal allowed the appeal. Banbury appealed to the House of Lords.

The House of Lords held by a majority of one (the Lord Chancellor and Lord Shaw dissenting) that there was not sufficient evidence to show that advising on investments formed part of a bank's business; there was no specific authority from the bank to the manager to do so in the present instance and it not being within the scope of his employment, there was no implied authority to bind the bank, and that the appellant could not recover.

The Court of Appeal had, as one of the grounds for their judgment, laid down that the appellant's action was barred by sec. 6 of Lord Tenterden's Act (9 Geo. IV., c. 14), which is as follows :—

" No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods unless such representation or assurance be made in writing signed by the party to be charged therewith."

The House of Lords, however, decided unanimously that this section only applies to an action for fraudulent misrepresentation, and not to an action such as this for breach of duty where no fraudulent intent was imputed.

Judgment for the respondents, the Bank of Montreal.

*Note.*—In view of the conflicting judgments and the narrow majority by which the result was arrived at in this case, it would not be conducive to a ready appreciation of its effect to set out those judgments in full.

On one point only were the Law Lords agreed, namely, that Lord Tenterden's Act did not touch the case.

This decision was contrary to the previous general opinion

and numerous earlier judgments, including that of the Court of Appeal in this identical case.

The authority of the House of Lords is, of course, conclusive, and the reasons adduced for this decision are quite convincing.

Though Lord Tenterden's Act does not in terms confine its operation to false and fraudulent statements, it is obvious from the history of its enactment and its use of the words "to charge any person" and "signed by the party to be charged therewith" that it contemplates only something in the nature of a criminal or, at least, a tortious misrepresentation, that is a false and fraudulent one. As Baron Bramwell said in Swift *v.* Jewsbury, L.R., 9 Q.B., 301: "The effect of the statute is this, that a man shall not be liable for a fraudulent misrepresentation as to another person's means unless he puts it down in writing and acknowledges his responsibility for it by his own signature."

It may be noted that, equally unanimously, the House of Lords held that, in any event, the signature of the bank's manager was not sufficient under the Act to bind the bank, thereby so far approving the earlier decisions.

In Banbury's case, the investment was a mortgage by a lumber company.

In ordinary purchases of shares or stock the person who gets the money is not the company or corporation, but a holder who sells on the Stock Exchange. It might well be doubted whether representations as to the character, credit, or trade of the issuing body were "to the intent and purpose" that it should obtain credit, money or goods within the wording of Lord Tenterden's Act.

The point is not now, however, material.

It was not suggested that either the bank or its manager had acted in any way fraudulently; consequently the Act had no application, and the way was clear for the determination of the general question. Here the difficulties which divided the House come in.

Innocent misrepresentation, even though followed by loss, affords of itself no cause of action. *Per* Lord Wrenbury in this case, *cf.* Heilbert, Symons and Co. *v.* Buckleton, [1913] A.C., 30.

So the plaintiff put his case on the ground of negligence in making the false representation. As Lord Wrenbury says:— "Innocent misrepresentation is not the cause of action, but evidence of the negligence which is the cause of action."

To establish negligence, however, the plaintiff had to show a duty to him on the part of the bank to take reasonable care in advising him and a breach of that duty.

Here he was met by two difficulties.

As far as appears from the case, there was nothing which could be construed into any definite contract or agreement between the parties, or any specified consideration for undertaking liability.

As against this, the House took the line that if it were part of the bank's business to advise on investments and they held themselves out as such advisers, anyone resorting to them for that purpose, even without fee or reward, was entitled, if the bank undertook to advise him, to the exercise of such skill and care as are reasonably to be expected from the bank's position and pretensions.

The case was analogous to that of a man who submits to the gratuitous treatment of a surgeon or a doctor. The confiding one's body, goods, or interests to the treatment or care of another is sufficient consideration to bind him to exercise such skill and intelligence as is usual with persons in his position.

But, here again, the plaintiff's case was met by three objections.

First. It was said that advising on investments was not part of a bank's business, therefore they did not hold themselves out as professing any superior knowledge, experience, or capacity in such matters; they were not like a doctor or other professional man, but simply like the man in the street.

Second. If it was not a bank's business to advise on investments, a bank manager who has only authority to transact legitimate business on behalf of the bank, cannot bind the bank by anything done outside those limits.

Third. Assuming advising was part of the bank's business and that a manager could bind the bank by advising, the authority did not extend to a local manager, the official who made the particular representation in this case.

Lords Atkinson and Wrenbury who, with Lord Parker, constituted the majority in favour of the bank, based their judgments mainly on the fact that advising on investments was not shown to be within the scope of the bank's business. Lord Parker said :—" It would be difficult to establish that advising on investments was part of the business of banking," and he rested his judgment largely on the ground that there was no evidence on which a jury could find that the bank was bound by the act of the manager, which comes to the same thing.

The Chancellor, Lord Finlay, who was in the minority, said :—" The limits of a banker's business cannot be laid down as a matter of law." But he added : " If he undertakes to advise, he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently."

The question whether advising on investments is an inherent part of banking business remains at large. It is a matter on which bankers are best qualified to judge; but it is common knowledge that bankers do very frequently advise, or obtain advice from their brokers for customers, and if the advice results in investment, carried through by the bank, the contract note shows the brokerage as divisible with the bank.

The view of the majority being against the advising being proved to be part of the bank's business, there could be no question of the devolution of authority on either general or local manager; there was no authority to devolve.

But, according to Lord Wrenbury, if the first proposition had been proved, the devolution of authority would have included the latter officer. He says:—" Either advising on investments was within the business of bankers or it was not. If it was, then not the head manager only, but the local manager, within his district, would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorize the local manager to do it."

As stated before, the investment in Banbury's case was a mortgage; the only question was the solvency of the mortgagor and the sufficiency of the security. Had Lord Tenterden's Act not been limited to fraudulent misrepresentation and had the advice been given with authority, it was assumed that Act would have applied. If regarded simply as information regarding the credit and status of a third party, it was clearly banking business. Somehow the case was side-tracked on to the question whether advising on investments, as distinct from information as to credit and standing, was an inherent part of banking business, and that question was left undecided for lack of evidence.

If bankers are to be held liable for advising on investments as distinct from giving information as to credit, the limits of their duty will have to be settled. Are they only bound to ascertain the commercial soundness of the investment or are they to investigate and gauge its financial and speculative prospects?

Comparing the Banbury case with another judgment of the House of Lords, it may be noted that, on the assumption that advising on investments is banking business, the former case seems to demand from the banker a good deal more than is required in giving information as to credit. According to the former case, the banker, in advising on investments, must exercise such care and judgment as a banker might be expected to bring to bear on a matter within his special sphere.

Robinson *v.* National Bank of Scotland, 53 Scottish Law Reporter, 390, also a House of Lords case, decided in 1916, was an action against the bank and their agent for false and fraudulent representation as to the credit and standing of two persons with whom the pursuer became co-guarantor. Lord Haldane said:—" In a case like this no duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But where a mere inquiry is made by one banker of another, who stands in no particular relation to him, then in the absence of special circumstances from which a contract to

be careful can be inferred. I think there is no duty except the duty of common honesty to which I have referred."

The discrepancy in the respective obligations is not easily explainable.

There is still another House of Lords case in which a general manager was held to have bound his bank by an agreement which hardly appears within the ambit of banking business, but which resulted in a judgment against the bank for some £50,000. Wilson *v.* United Counties Bank, [1920] A.C., 102.

In the Banbury case, the bank were interested in the company in which they advised the investment, and of this they fully informed Banbury.

Lord Finlay held that the fact of their being so interested did did not necessarily preclude the advising, so long as that interest was frankly disclosed. He pointed out that if confidential or other good reasons stood in the way of such disclosure, the bank should decline to advise.

[IN THE COURT OF APPEAL.]

## BRADFORD OLD BANK, LIMITED *v.* SUTCLIFFE.

Reported. [1918] 2 K.B. 833. 34 Times L.R. 619. Journal, Vol. XXXIX, p. 263.

*A Guarantor's Liability—Insanity of Principal Debtor—Payment on Demand.*

This was an appeal from a judgment of Mr. Justice A. T. Lawrence in an action of some importance to bankers. (See 34 The Times L.R., 299.)

The action was brought on a guarantee given by the defendant, Frank Sutcliffe, and his brother, Albert Sutcliffe, to the plaintiff bank on July 30th, 1894. Frank and Albert Sutcliffe were directors of Samuel Sutcliffe and Co. (Limited), spinners, of Bradford, who were customers of the bank, and it was arranged that debentures of the Company, together with a continuing guarantee by the two directors, to the amount of £6,100, should be handed to the bank as security for advances. The company had two accounts at the bank, a loan account and a current account. In August, 1898, the defendant, Frank Sutcliffe, became insane and was so found by inquisition. In December, 1899, formal notice of this was given to the bank and the order in lunacy was exhibited to the bank and noted on their books. Albert Sutcliffe, who was appointed committee of his brother's person and estate, opened a separate account entitled "*re* Frank Sutcliffe, a lunatic." Both of the accounts of the company were continued as before. At this date the amount due on the loan account was £3,400, and the amount due on the current account £269 5s.

In 1907 the plaintiff bank was absorbed by the United Counties Bank (Limited), which purchased all the assets and securities and took over the staff and the books of the plaintiff bank. A note was made in the books—"United Counties Bank (Limited) as from 13th February, 1907," that being the date of the agreement of sale. The two accounts which then stood at £3,600 on the loan account and £900 on the current account were entered as in account with the United Counties Bank, and all subsequent dealings by Sutcliffe and Co. (Limited), including the payment of interest, were with the United Counties Bank. The Bradford Old Bank was wound up, but was not dissolved;

its debentures were afterwards realised and £808 18s. 1d. was paid over to the United Counties Bank by the plaintiff bank as the proceeds of the £6,100 debentures, which had been deposited, and the action was brought to recover the balance of the two accounts.

Mr. Justice A. T. Lawrence held that the lunacy did not relieve the defendant, Frank Sutcliffe, from liability for the £3,400, the amount due on the loan account at the time when he became insane, but that the guarantee did not cover advances made after notice of the lunacy. He said as follows:—"For the defendant it was contended, first, that the lunacy put an end to his liability upon the guarantee. For the plaintiffs it was said that this cannot be so as to the £3,400 due upon the loan account at the time he became a lunatic. This, I think, is correct. It was an accrued liability from which his lunacy alone did not relieve him.

"It was argued for the plaintiffs that, as this was a continuing guarantee with a clause giving the guarantors, their executors, and administrators power to terminate it by three months' notice, it did not determine, but continued to be operative after the lunacy. I think this is wrong; the notice clause has nothing to do with lunacy. So far as lunacy is concerned the guarantee makes no provision for that event; it was neither contemplated nor provided for in the document.

"The bank, when it had received notice of the lunacy, could no longer make advances upon the faith of the guarantee. Lunacy operated upon this guarantee, just as death operates upon a continuing guarantee, and it contains no provision requiring a notice to terminate it. The creditor then knows that the guarantor has no longer a contracting mind, and consequently cannot be fixed with a contractual liability by any act done by the creditor alone."

Accordingly his Lordship gave judgment for the plaintiffs for £3,400, less £808 18s. 1d., with interest on the balance from the date of payment to the plaintiffs of the last-mentioned sum.

The defendant appealed.

Their Lordships, after considering their decision, dismissed the appeal.

JUDGMENT.

Lord Justice Pickford read a judgment in which he said:—"Mr. Justice Lawrence found that the plaintiffs were informed of Frank Sutcliffe's lunacy in 1899. The learned Judge held that Frank Sutcliffe's guarantee ceased to operate as a continuing guarantee from that date, and against that decision there was no appeal. Both parties in the argument treated the case on the basis that the continuing guarantee ceased then, but that on that date Frank Sutcliffe's estate remained liable for the debts then accrued due on the accounts. It was, however, argued that this

liability had terminated. At the date mentioned there was due to the plaintiffs £3,400 on the loan account and £269 5s. on the current account. The learned Judge has held that the latter amount has been satisfied by subsequent payments, and the plaintiffs accept the position. The only question, therefore, is as to the liability for the £3,400 due on the loan account. It was argued that this amount must also be held to be satisfied by subsequent payments into the current account exceeding the sum of £3,400, the ground of this argument being that the two accounts must be considered as one. I think that there is no foundation for this argument. The facts clearly show that the accounts must be kept distinct by arrangement between the plaintiffs and the company. If it were otherwise, the company would be extremely hampered in its business, for it could never safely draw on the current account so long as the credit balance did not exceed the amount due on the loan account. The effect of this arrangement is that payments to the credit of the current account are appropriated to that account and cannot be taken in reduction of the loan account.

"The defendant also contended that the claim was barred by the Statute of Limitations. The learned Judge held that that defence failed because the claim had been kept alive by payment of interest by the principal debtor—the company. I cannot agree with this reason, which seems to me to be contrary to the provisions of the Mercantile Law Amendment Act, 1856 (19 and 20 Vic., 97). But another answer was given by the plaintiffs—*i.e.*, that the cause of action did not accrue until demand by them and that no demand had been made until after the realization of the debentures in 1912, less than six years before the beginning of the action. This seems to depend upon the construction of the document. A cause of action accrues when all the facts exist which it is necessary to prove as a part of the case. (Reeves *v.* Butcher, [1891] 2 Q.B., 509.) If, therefore, it were necessary for the plaintiffs to prove a demand the cause of action did not accrue till after the demand. It was argued on behalf of the defendant that the words "on demand" should be neglected because the money was due, and therefore a demand was unnecessary and added nothing to the liability. This proposition is true in the case of what has been called a direct liability -for example, for money lent. There the liability exists as soon as the loan is made, and a promise to pay on demand adds nothing to it, as in the case of a promissory note for the amount payable on demand, and the words "on demand" may be neglected. It has, however, been held long ago that this doctrine does not apply to what has been called a collateral promise or collateral debt, and I think that a promise by a surety to pay the original debt is such a collateral promise or creates a collateral debt. This has been so decided by Mr. Justice Chitty in "Brown *v.* Brown" ([1893] 2 Ch., 300), a case which we were invited to

overrule. I think, however, that it was rightly decided and in accordance with the principle of the earlier cases.

"The only question, therefore, is whether on the construction of the guarantee the parties meant the words 'on demand' to mean what they say. I cannot doubt that they did. Interest is to run from demand. Clause 6 makes a demand a condition precedent to the guarantor's power to pay off the amount due, and Clause 10 suggests that a demand would be necessary to inform the guarantor of the deficiency left on the realization of the debentures. It may be that the effect of Clause 10 is to make the realization of the debentures and consequent loss a ground necessary to prove in order to establish a cause of action, but I do not think it necessary to decide this. In my opinion there was no cause of action till after demand, and the plea of the Statute of Limitations therefore fails.

"The last defence is that the surety was discharged by a novation of the debt, by which the liability of the company to the plaintiffs was discharged and another bank, called the United Counties Bank, became the creditor. In 1907 the plaintiffs amalgamated with the Birmingham District and Counties Banking Company (Limited), and the amalgamated banks were afterwards known as the United Counties Bank (Limited). The new bank continued to use the books formerly used by the plaintiffs, but the current and loan accounts were transferred in those books to the name of the United Counties Bank, and the company paid interest on the loan account by cheques drawn on the current account in favour of the United Counties Bank. The securities still remained in the name of the plaintiffs, though on the amalgamation all debts and choses in action and the benefit of all securities and guarantees were sold to the new bank by the plaintiffs, who undertook to take such action as was requested by the new bank to enforce any remedies for them. These transactions, and especially the dealings with the two accounts, were said to prove a novation by which the plaintiffs released the company from its debt, which was transferred to the United Counties Bank as creditor, and so discharged the surety. I think it doubtful whether such a novation was effected. It is not necessary to decide this, as I am of opinion that even if there were such a novation it does not discharge the surety. There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must effect a material alteration in his position. Here the debt was ascertained as long ago as 1899, and the alleged novation did not take place until 1907, the original debtor still remaining liable for the debt. It has been clearly decided in a case by which

we are bound that an assignment of the debt does not discharge the surety—see Wheatley *v.* Bastow (7 De G. M. and G., 261). For all purposes, so far as the interests of the surety are concerned, a novation by which the original creditor releases the debtor has no greater effect than an assignment of the debt with notice to the surety. In either case the transferee of the debt, whether by novation or assignment, is the person with whom the surety has to deal, and as the liability is already ascertained it is a matter of no consequence to whom he has to pay it.

"The result is that the appeal fails and must be dismissed, with costs."

Lord Justice Bankes and Lord Justice Scrutton concurred.

Appeal dismissed.

*Note.*—There are several points to be noted in this case.

1. The lunacy of the principal debtor, when notice thereof reaches the creditor, precludes further advances on the security of a guarantee. In like manner, notice of the lunacy of a customer operates as withdrawal of authority to pay cheques presented after such notice. Drew *v.* Nunn, 4 Q.B.D., 661. Daily Telegraph newspaper *v.* Loughlin, [1904] A.C., 776.

2. Where a guarantor's liability to pay is specified to be "on demand," these words are operative; a demand is necessary before a cause of action accrues, and the Statute of Limitations does not begin to run until such demand has been made. As to the implication and effect of these words in the case of a current account, see Joachimson *v.* Swiss Bank Corporation, [1921] 3 K.B., 110, *post*, p. 233.

3. The assignment of an ascertained guaranteed debt does not discharge the guarantor; the substitution of one creditor for another not materially affecting the position of the guarantor. It is not the same thing as a novation, where the original debtor is discharged and his obligation, with the assent of the creditor, assumed by another. That would release the surety. Commercial Bank of Tasmania *v.* Jones, [1893] A.C., 313.

Bankes, L.J., expressed the opinion that a creditor may assign his debt or his securities without releasing the surety.

The decision is valuable in view of the absorption of the guaranteed bank by another, although Pickford, L.J., speaks of it as an amalgamation.

But it must be borne in mind that the authority only extends to a definite ascertained debt, in other words, the amount due at the date of the assignment. It does not cover subsequent advances by the substituted creditor. *Cf. per* Lord Eldon in *ex parte* Kensington 2 V. and B., 83. The efficacy of provision for such contingency in the original guarantee would seem to be doubtful.

[IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

## EGBERT AND OTHERS *v.* NORTHERN CROWN BANK.

Reported. [1918] A.C. 903. Journal, Vol. XXXIX, p. 312.

*Joint and Several Guarantee—Death of Guarantor—Determination.*

CERTAIN persons gave the respondents, who were a Canadian banking company, a written guarantee to secure advances made to a company by the bank "in the way of its business as a bank." The guarantee covered interest and contained the following clause: "And this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee." By the Canadian Bank Act it is illegal for a bank to charge more than 7 per cent. interest, but after a time the bank raised the interest from 7 to 8 per cent., and this was agreed to by the company. Subsequently one of the guarantors died and his executors wrote a letter revoking the guarantee, but nevertheless fresh advances were made by the bank. When the account was finally closed the bank brought an action on the guarantee against the appellants, who were the surviving guarantors and the executors of the deceased guarantor.

*Held*, that the above clause meant that the guarantee was to remain in force until notice was given by all the guarantors, the executors of any deceased guarantor taking his place, and that though the increase of the interest to 8 per cent. was invalid it did not invalidate the contract to pay the principal, and therefore all the appellants were liable on the guarantee but interest must be calculated at the legal rate.

In the course of the judgment read by Lord Dunedin he said:—

"It is not necessary to examine what is the law in the case of death when nothing is said in the guarantee about its continuation or not. Here there is a clause which specially deals with the question of control, and the question necessarily depends on the true construction of that clause above quoted beginning 'and this shall be a continuing guarantee.'

"Their Lordships are of opinion that this clause stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place. Such a stipulation is in accordance with the literal meaning of the words, and is in harmony with what might be expected, looking to the position of the persons who were granting the obligation. Further, if it had been sought to allow any one to bring the guarantee to an end, either for himself or for all, nothing would have been easier than to express such an intention by such words as 'all or any of the undersigned,' or other appropriate expression. This disposes of the first ground of defence in both its alternatives."

*Note.*—The effect of the mere fact of the death of a single surety or one of several co-sureties, in the absence of notice or special provision, is somewhat doubtful. Probably it does not put an end to the guarantee. Bradbury *v.* Morgan, 1 H. and C., 249. Later cases, however, are not so clear on the point, *cf.* Harriss *v.* Fawcett, L.R. 8 Ch., at p. 869; Coulthart *v.* Clementson, 5 Q.B.D., 42; *in re* Silvester, [1895] 1 Ch., 573; *in re* Crace, [1902] 1 Ch., at p. 739.

[IN THE KING'S BENCH DIVISION.]

## MAMBRE SACCHARINE CO., LTD. *v.* CORN PRODUCTS CO., LTD.

35 Times L.R. 94. Journal, Vol. XL, p. 4

*Policy of Insurance.*

A POINT of some interest to banks in connection with marine insurance was involved. The action was brought to recover damages for the breach of two contracts, both in similar terms, one of which was as follows: "We have this day sold you the following goods: 4,000 280-lb. bags American pearl starch, price 14s. 6d. per cwt., c.i.f. London, including war risk insurance. Shipment December-January, 1916-17 (sellers' option). Terms, net cash against documents upon presentation."

The letters "c.i.f." stand for "cost, insurance and freight," and, as Mr. Justice McCardie explained, "the essential feature of a c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor."

The vessel on which the cargo was shipped was sunk by enemy action, and the vendors were aware of this on the date when they despatched the documents, but the judge held that the buyers were not entitled to reject the tender of documents on the grounds that the ship had, to the knowledge of the vendors, been sunk before the date of the tender.

Among the documents, however, was no policy of insurance, but instead a letter stating that the vendors held the buyers covered by insurance for the amount of £4,322 in accordance with the terms of a policy of insurance in the vendor's possession. The judge held that this was not tantamount to the tender of a policy of insurance, and that the vendors had not carried out the terms of the contract. "The plaintiffs I hold were clearly entitled to a policy and not to mere assertions by the defendant that a policy existed."

What had happened was that, in accordance with a practice which has of late increased in the case of shipments from America, the vendors had insured a large consignment of goods of which those in the case formed only a part, and had retained the policy

in America. "Even if the defendants had tendered the policies actually held by them, I should still have held the tender bad," said the judge, "for they were policies which covered a quantity of goods outside those mentioned in the bills of lading."

*Note.*—In the face of this judgment bankers must decline to accept a letter holding the consignee covered in place of a policy, and must see that the policy covers the goods referred to in the bills of lading and no other.

[IN THE KING'S BENCH DIVISION.]

## LONDON PROVINCIAL AND SOUTH WESTERN BANK *v.* BUSZARD.

35 Times L.R. 142. Journal, Vol. XL, p. 5.

*Stopping Cheque—Notice only to Branch on which drawn—Cheque cashed at another Branch.*

In this case the defendant drew a cheque on his account at the Oxford Street branch of the bank, payment of which he subsequently stopped. Shortly after the cheque was cashed by the Victoria Street branch of the bank for the payee, who was a customer of that branch. On presentation the cheque was returned marked "Ordered not to pay," and the bank sought, as holders in due course, to recover the amount from the drawer. The *bonâ fides* of the bank was not in question, but counsel argued that the bank had notice of the countermand of payment, in that notice to one branch of the bank was notice to all.

The judge held that the notice to stop payment was only effective at the branch to which it was sent.

Judgment for the bank.

*Note.* It has been frequently held that for purposes of notice of dishonour, each constituent branch of a bank is an independent entity. Clode *v.* Bayley, 12 M. and W., 51; Prince *v.* Oriental Bank Corporation, 3 A.C., at p. 332. Fielding *v.* Corry, [1898] 1 Q.B., 268.

The judge held that the same principle applies to the stopping a cheque.

Although a bank may combine accounts kept at different branches, the customer has not the same facilities; he must regard each branch at which he deals as though it were an individual independent bank. *Cf. per* Atkin, L.J., in Joachimson *v.* Swiss Bank Corporation, [1921] 3 K.B., at p. 127, *post*, p. 236.

[IN THE KING'S BENCH DIVISION.]

## ROSS *v.* LONDON COUNTY WESTMINSTER AND PARR'S BANK.

Reported. [1919] 1 K.B. 678. 35 Times L.R. 315.

*Bankers' Drafts—Crossing—Collecting Banker.*

CERTAIN bankers' drafts drawn by one branch of a bank on another branch of the same bank were issued, payable to the order of the officer in charge of one of the departments of the Paymaster-General of the Canadian Overseas Forces in his designated official capacity, ostensibly crossed. That officer duly endorsed them. They were stolen by a clerk in his employ and paid in by that clerk at the Berners Street branch of the defendant bank for the credit of his private account at the Herne Hill branch of the same bank. It appears that the Herne Hill branch never saw the documents, while the Berners Street branch had no knowledge of the character of the account at the former branch.

The action was for conversion of the instruments and for money had and received. The bank relied on sec. 82, but at the trial their counsel contended that alternatively they were entitled to judgment as being holders in due course. This defence had not been raised on the pleadings, and the judge excluded it.

The judge held that the instruments were cheques, consequently within sec. 82, but he decided against the bank on the ground that they had not acted without negligence. He said:—"Was it in the ordinary course of business that a cheque so drawn and endorsed should be paid to some private person? The answer was in the negative. Therefore a person of ordinary intelligence who was fit to be employed by the bank ought to be put upon inquiry." He also said: "I am told that during the period in question the cashiers and the clerks at the branches were being constantly changed and that some of them could not have had very long experience of their work. I must, however, attribute to the cashiers and clerks of the defendants the degree of intelligence and knowledge ordinarily required of persons in their position to fit them for the discharge of their duties."

Judgment for the plaintiff.

*Note.*—This is an unsatisfactory case. The judge held these instruments were cheques. They were not cheques. Under the Bills of Exchange Act a cheque must be a bill and a bill must be drawn by one person on another. All branches of a bank are for this purpose one entity. That bankers' drafts are not cheques was definitely decided by the House of Lords in the Gordon case. Nor are they susceptible of crossing as dividend warrants, nor under sec. 17 of the Revenue Act 1883, not being issued "by a customer of any banker." Therefore they cannot be effectively crossed and an ostensible crossing does not bring them within sec. 82.

The judge held these were cheques and so did not refer to or rely on the dubious theory propounded by the Privy Council in Union Bank of Australia *v.* McClintock, [1922] 1 A.C., 240, as to which see note to Guardians of St. John's, Hampstead *v.* Barclays Bank, *post*, p. 282, that if a man issues or negotiates an instrument which, by virtue of being ostensibly crossed, can in practice only be cashed through a bank, he cannot deny to a collecting banker the protection he would enjoy were the crossing authorized by law. So far as sec. 82 is concerned it probably was negligence, though in a minor degree, to take from an unknown person for a private account an instrument obviously designed for public purposes, notwithstanding it was duly endorsed and so commercially available in anyone's hands.

The incident of the drafts having been paid in at one branch but credited at another does not seem material. *Primâ facie*, the bank as a whole was guilty of conversion by taking the drafts from a wrongful holder and presenting them for payment on his behalf.

In practically every crossed cheque case the actual presentation for payment, which is the central act of conversion, is accomplished by head office through the Clearing House. Conversely, it has never been contended that the technical receipt of the money through the same medium is not "receiving payment for a customer," within sec. 82, although the customer keeps his account at a particular branch, and is, in a sense, the customer of that branch only.

The bank relied on sec. 82. They had to show that they received payment for a customer in good faith and without negligence either in taking the so-called cheques or at any stage of the collection.

They could not very well contend at the same time that they collected the drafts for a customer and that they were not responsible for what took place at the Berners Street branch because the man had no account there. That branch took in the drafts for credit of a private account, and it could make no difference that that private account was at another branch.

The Herne Hill branch apparently never saw the drafts, they only credited their customer with the amount on instructions either from the Head Office or from the Berners Street branch. It would seem that no negligence was attributed or attributable to them. It is a pity that the defence of *bonâ fide* holder for value was not argued in this case.

Paying in cheques at a strange branch often assumes the character of the bank's becoming transferees of them. One does not know exactly what took place at the Berners Street branch, but it is understood that the drafts were credited as cash to the fraudulent clerk at the Herne Hill branch before the proceeds were received. That suggests that there was some arrangement to that effect with the Berners Street branch. If so, it would go far to show that the bank took the drafts as transferees. Even without this, there was the crediting as cash, which probably affects drafts. The principle has been applied to bills, though perhaps not to bills payable on demand. See *per* Vaughan Williams, J., *in re* Mills Bawtree and Co., 10 Morrell's Bankruptcy Cases, 193. It was treated as applicable to orders in Bavins' case. Anyway, the judge had ruled that these were cheques.

The drafts were genuinely and validly endorsed, there was no question of forged endorsement. If therefore the bank took them for value and without notice they were holders in due course, entitled under sec. 5 (2) to treat them either as bills or notes, and retain them and the proceeds against anybody.

When this case was decided, crediting as cash should have afforded a good defence, but the whole question has since been re-opened in A. L. Underwood, Ltd. *v.* Barclays Bank, *post*, p. 323. See that case and note thereto.

Circumstances may establish negligence and yet fall far short of proving notice; these were fully negotiable instruments and to hold the bank liable, if they were regarded as holders for value, the judge would have had to find that they, by their officials, were guilty, not of mere negligence, but of wilful blindness and abstention from inquiry in face of suspicious circumstances, amounting very nearly to dishonesty. Inasmuch as the bank had no personal interest whatever in the matter and apparently gave the face value, this would have been a difficult conclusion to arrive at.

The judge's remarks as to the difficulties of carrying on banking business during the period referred to, which were presumably due to the war, are not very sympathetic. They constitute another negation of the defence of exigencies of business.

[IN THE PRIVY COUNCIL.]

## BRITISH AMERICA ELEVATOR CO., LTD. *v.* BANK OF BRITISH NORTH AMERICA.

Reported. [1919] A.C. 658. Journal, Vol. XL, p. 262.

*Credits to Agent's Private Account—Liability of Bank.*

THE respondent bank agreed with the appellants to furnish the appellants' agent with cash in exchange for drafts upon the appellants. The cash, as the bank knew, was to be used in paying for grain to be purchased for the appellants by their agent. In numerous cases the respondents, instead of giving the agent cash, credited the drafts, wholly or in part, to the agent's private account. On this account there was generally an overdraft, which the head office of the bank was pressing the local manager to extinguish or cover.

The Court of Appeal of Manitoba ordered an account to be taken to ascertain what loss the appellants had sustained by reason of the drafts being credited to the agent's private account, and that judgment should be entered for the amount of such loss, less the amount, if any, received by the appellants from their agent on account of such drafts.

The plaintiffs appealed and claimed payment of the total of the sums misapplied in breach of trust. It was admitted in the Court of Appeal that the total indebtedness of the agent to the appellants was less than the amount sued for.

The Privy Council, whose judgment was delivered by Viscount Haldane, held that the respondents having been parties to a misapplication of trust funds, the appellants were entitled to judgment for the full amount sued for. The Court of Appeal should have treated the claim as one for replacement of trust funds, and not for damages.

*Note.*—*Cf.* John *v.* Dodwell, [1918] A.C., 563. An agent is in a fiduciary position. If anyone takes from an agent property or money with knowledge that the agent, in so dealing with it, is committing a breach of trust, he holds it under a transmitted fiduciary obligation to account for it to that agent's principal. The same, of course, applies in the case of a trustee or any other person occupying a fiduciary capacity. When to this is added the development of the "tracing order" procedure for following money, exemplified in Sinclair *v.* Brougham, [1914] A.C., 398, it may be doubted whether the fine distinctions laid down in earlier cases as to a banker's right to retain money received from a known trust fund are now to be implicitly relied upon.

[IN THE KING'S BENCH DIVISION.]

## WILSON, HOLGATE AND CO., LTD. *v.* BELGIAN GRAIN AND PRODUCE CO., LTD.

Reported. [1920] 2 K.B. 1. [1919] W.N. 18 (). Journal, Vol. XL, p. 262.

*Shipping Documents—Certificate of Insurance in lieu of Policy.*

By a contract in writing the plaintiffs sold to the defendants goods for which payment was to be made by net cash in London against shipping documents. The plaintiffs instructed their brokers to insure the goods and the latter forwarded a broker's cover note. This was tendered with the shipping documents in place of a policy of insurance, but the documents were refused by the defendants as not in order. Three days later the defendants agreed to take a certificate of insurance signed by a broker together with a broker's undertaking to hold the policy for the defendants' account. The documents were again tendered, with a certificate of insurance, but without the broker's undertaking, and payment was again refused. The plaintiffs then brought this action for damages for non-acceptance of the goods.

Bailhache, J., said that the main question was whether the plaintiffs had made an effective legal tender of documents to the defendants. It had been laid down in "Ireland *v.* Livingstone" (L.R., 5 H.L., 395), decided in 1872, that under a c.i.f. contract the seller must tender to the buyer, along with the other documents, a proper policy of insurance, and the law as laid down in that case had generally been regarded as settled. In the present case evidence had, however, been called by the plaintiffs with a view to proving that a custom had arisen, according to which the seller might tender a broker's cover note or certificate of insurance instead of a policy. That evidence no doubt showed that these cover notes and certificates were constantly accepted as equivalent to policies, but it was to be observed that none of the witnesses went so far as to say that a seller could oblige a buyer to accept any such document in place of a policy. His Lordship was not satisfied that the alleged custom had been proved. The buyer might, no doubt, waive his right to a policy. In the present case the defendants had done so by agreeing to

accept a certificate of insurance and a broker's undertaking instead of a policy. The plaintiffs, however, had tendered to the defendants the former of these documents only and not the latter, so that the defendants did not get that which they had stipulated to get instead of a policy. The plaintiffs had failed to perform either their original obligation to tender a policy, or their substituted obligation to tender a certificate of insurance, together with a broker's undertaking. There would be judgment for the defendants.

Judgment for defendants.

*Note.*—This case was approved in Scott *v.* Barclays Bank, *post, p.* 279.

[IN THE COURT OF APPEAL.]

## *In re* THELUSSON. *Ex parte* ABDY.

Reported. [1919] 2 K.B. 735. Journal, Vol. XL, p. 263.

*Payment to Debtor's Account in Ignorance of Receiving Order.*

THE appellant on January 3rd, 1919, paid into the debtor's banking account a sum of money in respect of a loan transaction in ignorance of the fact that a receiving order had been made against the debtor of which neither the appellant nor the debtor was aware at the time the payment was made.

In the King's Bench Division Mr. Justice Horridge had dismissed a motion that the loan transaction should be rescinded, on the ground that there was no principle on which the transaction could be set aside. The Court allowed the appeal. They held that the court in bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the court, where such insistence would produce an unjust and dishonest result. The trustee in the present case claimed to be entitled as of legal right to retain a sum of money which would not have been paid by the appellant to the bankrupt's account if he had known of the receiving order. The bankrupt could not honestly have received that sum, and the trustee ought to be directed to refund it. Principle established in *ex parte* James, [1874] L.R., 9 Ch., 609; *ex parte* Simmonds, [1885] 16 Q.B.D., 208; and *in re* Tyler, [1907] 1 K.B., 865, applied.

Warrington, L.J., in his judgment said as follows:—"The question in this appeal is whether the circumstances of the case justify the exercise by the Court of the jurisdiction it has often exercised of directing its officer, in this case a trustee in bankruptcy, to pursue a line of conduct which an honest man, actuated by motives of morality and justice, would pursue, although not compelled thereto by legal process."

Appeal allowed.

*Note.*—In *in re* Tyler, [1907] 1 K.B., 865, above cited, Farwell, L.J., said:—"As I understand the principle laid down in the case to which my Lord has referred, it comes to this: that an officer of the Court is bound to be even more straightforward and

honest than an ordinary person is in the affairs of everyday life. It would be insufferable for this Court to have it said of it that it has been guilty, by its officer, of a dirty trick."

It is not perhaps easy to reconcile these sentiments with the case of *in re* Wigzell, [1921] 2. K.B., 835, *post* p. 240, where the banker had to pay to the trustee moneys received from the bankrupt after receiving order, but while publication of notice thereof had been suspended by the Court, and was not allowed to deduct cheques paid during that interval.

Apparently the distinction was that the trustee was not responsible for the order suspending publication, that his business was to get in the assets for the creditors, and that being his legal duty, he was not in a position to exercise high-mindedness at their expense. See also Trustee of A. F. Scranton *v.* Pearse, [1922] 2 Ch. 87, as to recovery of bets paid by cheque.

[IN THE COURT OF APPEAL.]

## NATIONAL BANK OF EGYPT *v.* HANNEVIG'S BANK.

Journal, Vol. XL, p. 305.

*Confirmed Credits and Clean Bills of Lading.*

THIS case raises a very interesting point with regard to the duty of a bank in negotiating shipping documents under a confirmed credit. The facts were as follows: The defendants were apparently interested on joint account with a Manchester firm for the purchase of onions from Egypt, and in order to work that business, it was necessary to open a bank credit in England, and in order to open that credit, the defendants wrote to the plaintiffs a letter of instructions of June 19th, 1918, which was in these terms: "With reference to our previously made arrangement, we shall be glad if you will kindly cable out immediately to your Alexandria office opening a confirmed sight credit in favour of Messrs. Pilpel & Son, Alexandria, for account of Messrs. Walton, Son and Co., Manchester, for 40,000 bags of Egyptian onions at the price of 35s. per bag c.i.f. U.K., to be shipped during June-July-August this year, shipment on deck is permitted. The relative amount is payable against delivery of bills of lading, marine and war risk insurance certificate and invoice. On hearing from you the cost of your cable, we will refund you the expenses."

Under the terms of this credit, onions were shipped and the documents were forwarded to this country by the Alexandria branch of the National Bank of Egypt. The bill of lading was, however, endorsed to the effect that several of the bags were torn and re-sewn, and the defendants claimed that this was not in accordance with the conditions of the credit, in which the term bills of lading must be taken to mean "clean" bills of lading, that is to say bills of lading without any qualifications of the general receipt "accepted in good order and condition" which appears on the face of bills of lading.

The case was decided in favour of the plaintiffs, the National Bank of Egypt, on the ground that in the course of subsequent correspondence the defendants had waived their objection to the qualified bill of lading, so that the general principle underlying the point at issue was not decided. The wording of the judgment,

however, leaves little room for doubt as to the decision which would have been reached had it been necessary to decide the point. Lord Justice Bankes, after referring to the fact that the learned judge in the lower Court had accepted the defendants' contention that the letter of credit must be interpreted as stipulating for clean bills of lading, said: "I think, had the question been one which had to be decided in this case, it would be necessary to consider very carefully whether the view taken by the learned judge was the correct one." Lord Justice Scrutton went further: "In some cases," he said, "the obligation of a banker, under such a credit, may need very careful examination. I only say at present that to assume that for one-sixteenth per cent. of the amount he advances, a bank is bound carefully to read through all bills of lading presented to it in ridiculously minute type and full of exceptions, to read through the policies and to exercise a judgment as to whether the legal effect of the bill of lading and the policy is, on the whole, favourable to their clients, is an obligation which I should require to investigate considerably before I accepted it in that unhesitating form. . . . There were two views put before the learned judge on the pleadings, one that this credit calls for 'clean' bills of lading, the other that it calls for 'usual' bills of lading. . . . My present impression is, I do not know that it is necessary to decide it finally in view of the grounds on which we are deciding this case, that a mere credit against delivery of bills of lading is not necessarily a credit against 'clean' bills of lading. It depends on the facts of the case. A c.i.f. contract involves your providing a contract of insurance and a contract of carriage, and what the particular contract of insurance and contract of carriage specify as the obligation is, in my view, a question of evidence of the usual conditions of trade at the time. . . . The question is whether 'clean' bill of lading is 'usual' bill of lading in the trade at the time."

*Note.*—Looking at the matter from a business point of view, although bankers will appreciate Lord Justice Scrutton's reference to the unsatisfactory form of many bills of lading, it must not be forgotten that a banker who issues a credit owes a duty to the person at whose request it is issued, to look after the latter's business interests, and that unless he takes reasonable care in examining bills of lading, he will not long retain the confidence of his customer.

[IN THE KING'S BENCH DIVISION.]

## SOUCHETTE, LTD. *v.* LONDON COUNTY WESTMINSTER AND PARR'S BANK LTD.

36 Times L.R. 195. Journal, Vol. XLI, p. 73.

*Collecting Banker's Liability.*

In this action the plaintiffs' claim was for damages for conversion of cheques drawn by them, or alternatively for money had and received.

The plaintiff company sold goods known as Souchette sweetening tablets. Mr. Frank Matthews was the secretary and managing director of the business. In the course of his employment Mr. Matthews purported to buy sweetening tablets from Dr. Wurtz, and the plaintiff company drew cheques to the amount of £762 10s. on the National Bank of South Africa, Limited, payable to Dr. Wurtz. Those cheques were delivered to Mr. Matthews as manager, that he might hand them to Dr. Wurtz for the goods alleged to have been purchased. The cheques were drawn by the plaintiff company during May, June, and August, 1918, some "to order," others "to bearer" and crossed. Mr. Matthews had an account with the defendant bank, and instead of handing the cheques to Dr. Wurtz, he forged the endorsement to the order cheques or fraudulently procured such endorsement to be forged, and paid the cheques into his own account with the defendant bank, which credited him with the amount and obtained payment of the cheques from the National Bank of South Africa. Dr. Wurtz never received any of the cheques.

On behalf of the plaintiff company, it was contended that in the circumstances the bank, knowing that Mr. Matthews was secretary to the plaintiff company, on receiving these cheques drawn by the plaintiff company and signed by two directors on behalf of the company, on the National Bank of South Africa and payable to Dr. Wurtz, was or should have been put on inquiry, as there was sufficient indication that the customer was using for his own benefit the property of another. The defendant bank in not having made any inquiry had acted negligently, and could not claim the benefit of sec. 82 of the Bills of Exchange Act.

On behalf of the bank, it was submitted that there had been no negligence.

Mr. Justice Greer :—" I think that it is for you to prove that there has been no negligence, as protection is given to the bank by sec. 82 of the Bills of Exchange Act."

Evidence was then called, and on behalf of the bank Mr. Milstead, assistant manager of the Lombard Street branch, said that a careful bank would not have had any cause for inquiry or suspicion on receiving such cheques.

Mr. Justice Greer :—" This case is not without its difficulties. It is an action by the pliantiff company to recover damages for the conversion of certain cheques or alternatively for money had and received against the defendant bank, who were for the purposes of this case the collecting bank. *Primâ facie*, anyone who deals adversely with any other person's property is liable in law for so doing unless he can make out one or other of the well-known defences. As regards cheques, apart from sec. 82 of the Bills of Exchange Act, 1882, any collecting bank converting a cheque into money without the assent of the owner would be liable in damages for conversion. Section 82 puts the banker in an exceptional position in regard to crossed cheques by providing that where the banker in good faith, and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. In the present case the defendant's bank received payment from the paying bank of the cheques which are the subject matter of this action. They were crossed cheques. They were cheques, so far as I can deal with them, with regard to which their customer, Mr. Matthews, had no title whatever. They were not his cheques, and it was not a case of his having an effective title. Therefore, in order to escape liability it has got to be made out that the banker received payment in good faith and without negligence.

" With regard to a number of these cheques which were drawn to ' Wurtz or bearer ' by two directors of the company, who were entitled to draw those cheques for the purpose of carrying on the business, I am satisfied that there was no negligence on the part of the defendants' company in collecting those cheques upon the instructions of Mr. Matthews, who was their customer, because they were entitled to suppose that the directors who drew these cheques drew them to ' bearer ' for convenience in order that they might be dealt with by the bearer for the benefit of the company. It might be for the convenience of the business that

those cheques should pass through the accounts, and then be used for the benefit of the company. I do not think there was any negligence of the teller of the defendant bank when a cheque was presented to him by a customer payable to 'Wurtz or bearer' in collecting that cheque. With regard to other cheques that I have to deal with in which the claim is concerned different considerations arise, and I propose first of all to deal with the cheque for £97 10s. That was a cheque dated May 27th, 1918. It was when first presented to the defendant bank in the form of 'Pay self or order,' and then signed for the Souchette Company by two directors, Mr. England and the managing director, Frank Matthews. It went through Mr. Matthews's account, and was presented by the defendant company to the National Bank of South Africa in order that it might be collected, and placed to the credit of Mr. Matthews. The bank declined to pay on the cheque as it was then, and in some way or other it went back to Mr. Matthews to be put in order. When it came back to be collected again it was in this form, 'Pay self, T. Matthews, or order.' The addition of the words 'T. Matthews' was not authenticated by the initials of Mr. England, the other signing director. It was in Mr. Matthews's own writing—obviously in his own writing. Then apparently the word 'self' was not crossed out, and Matthews endorsed. When it came to the defendant bank if they thought about it at all they would have seen that it was an alteration of a cheque which was payable only to the order of the company itself, into a cheque payable to the order of T. Matthews, one of the directors who had signed it, without apparently the concurrence of the other director. In my judgment the defendant bank were negligent in cashing that cheque when it came back in that form without making any inquiries to see whether or not the other bank or company were willing that the cheque should be placed to the credit of Mr. Matthews's account.

"Then there are five cheques for the sum of £62 10s. each, which were made out to a customer named 'Wurtz or order,' and they were signed by Matthews, the managing director, and also by Mr. England, for the purpose of paying for goods which were being bought on behalf of the company by the managing director. Instead of paying them direct to the customer what the managing director, Matthews, did was this: He got cheques for a larger amount than was required for the goods which Wurtz was selling to the company. He paid those cheques in having forged the signature, first, on the back of the cheques; he paid them in to the defendant bank who collected the money. His usual course was to pay a smaller amount by his own cheque to Mr. Wurtz in exchange for the goods. In the case of four of these cheques he did in fact pay £60 on the company's behalf in respect

of the very transaction with regard to which the cheque was drawn. I am not satisfied that he did in the fifth case.*

"The question arises what is the measure of damages with regard to these matters in question. Supposing I take the action as an action for money had and received to the use of the plaintiff company, it seems perfectly clear that the bank are entitled to say, 'If we received £62 10s. to the use of the plaintiff company, we paid out of that £62 10s. £60 for the benefit of the plaintiffs to persons to whom the plaintiff company desired that that money should be paid, and on that ground the balance of £2 10s. is the only sum received by the defendant company.' If the case is looked at from the point of view of damages for conversion, there may be some technical difficulties, because it has been frequently laid down as a general rule that the measure of damages is the value of the thing converted at the time of its conversion. There are many cases in which the circumstances have been taken into account in order to reduce the damages below what they would *primâ facie* be. The case was referred to in the course of the argument where it was held that the purchaser was not entitled to recover the full value but only the difference between the value of the goods and the price at which the vendor held them. Following what I conceive to be the judgment of Mr. Justice Channell in the case of Bevan *v.* the Capital and Counties Bank, Ltd., which is reported in 23 Times Law Reports, page 65, I think I am entitled to come to the conclusion that in all these four cases the damage for the conversion of the cheques—the ultimate loss which the plaintiffs suffer—is only £2 10s. on each cheque.

"With regard to the last cheque I am not satisfied that any sum was ever paid by the defendant bank in respect of that cheque, and therefore there must be judgment in respect of that cheque for the whole amount. That makes £170. There will be judgment for the plaintiffs for £170."

*Note.*—This is another case illustrating the danger of collecting for private account cheques showing on their face that they are drawn or intended for corporate or partnership purposes. The most recent case on the point is Underwood *v.* Bank of Liverpool, 40 Times L.R. 302., *post*, p. 323.

It was clearly wrong for the defendant bank to collect for Matthews's account a cheque drawn "pay self or order" signed by Matthews and another director, altered to "pay self, T. Matthews, or order" in Matthews's handwriting, not initialled by the other drawer and endorsed by Matthews alone. Nor should the paying bank have paid it in that condition.

The reduction of the amount recoverable by that shown to

* Evidence on this point was subsequently submitted to the Court and the damages reduced from £170 to £110.

have reached the hands of the person actually entitled seems in the circumstances eminently reasonable. Somewhat similar views are expressed in Reid *v.* Rigby, [1894] 2. Q.B., 43, 44. Technically, the ruling seems somewhat to clash with the decisions as to a man who has wrongfully obtained money on a negotiable instrument being estopped from denying its value to be that amount. The bank converted the whole cheque; what the fraudulent person did by means of his own cheque on that bank might be deemed irrelevant. Still substantial justice was undoubtedly done.

On somewhat the same principle, in the above-mentioned case of Underwood, where the customer's money was mixed with that wrongfully paid into his account, the Court directed an inquiry as to what was due.

[IN THE PRIVY COUNCIL.]

## COMMISSIONERS OF TAXATION *v.* ENGLISH, SCOTTISH AND AUSTRALIAN BANK.

Reported. [1920] A.C. 683. Journal, Vol. XLI, p. 117.

*What is a Customer?*

This case, which was an appeal from the Supreme Court of New South Wales, was decided on sec. 88 of the Australian Bills of Exchange Act, 1909, which is in identical terms with sec. 82 of the English Bills of Exchange Act. It appears that one Thallon opened an account with the head office of the respondent bank in Sydney by paying in bank notes to the amount of £20. Nothing is said in the report of the case about an introduction or reference having been asked for or tendered. Next day Thallon paid in a crossed cheque for £786 18s. 3d., payable to O53 or bearer, which it was subsequently ascertained had been placed in the letter box of the Commissioners of Taxation, from which it was stolen by some person unknown. Thallon drew out the money and no more was seen of him. The questions which the Judicial Committee was asked to decide were whether Thallon was a customer within the meaning of sec. 88, and, if so, whether the bank had acted without negligence in collecting the cheque. Both questions were answered in the affirmative.

Dealing with the first question, Lord Dunedin said :—" Their Lordships are of opinion that the word 'customer' signifies a relationship in which duration is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitué and a new-comer, but between a person for whom the bank performs a casual service, such as, *e.g.*, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank. Thallon was therefore a customer, though one of short standing."

Dealing with the allegation of negligence, Lord Dunedin pointed out that there was nothing suspicious about the way the account was opened, and there was no note of warning of any kind

on the cheque. If it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render banking business impossible. He quoted with the approval of the Court the *dictum* of Mr. Justice Isaacs in an Australian case that "the test of negligence is whether the transaction of paying in any given cheque (coupled with the circumstances antecedent and present) was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry."

The judgment further contained the following passage:—"It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting the cheque."

*Note.*—1. Decisions or so-called judgments of the Judicial Committee of the Privy Council are not binding on the Courts of this country, but as the personal constitution of that body is much the same as that of the House of Lords when sitting as the final tribunal, such decisions naturally carry great weight and are constantly quoted.

It does not, however, follow that the decision that a first transaction constitutes "a customer" within sec. 82 will be accepted without demur. The same line was taken by Bailhache, J., in Ladbroke *v.* Todd, 30 Times L.R., 433, *ante*, p. 89, where he said that to make a man a customer "it is not necessary he should have drawn on any money or even that he should be in a position to draw any money."

On the other hand, there are numerous authorities to the effect that some measure of use and custom is an essential element of the character. Matthews *v.* Williams Brown and Co., 10 Times L.R., 386. Great Western Railway *v.* London and County Bank, [1901] A.C., 414. Lacave *v.* Credit Lyonnais, [1897] 1 Q.B., 148. Tate *v.* Wilts and Dorset Bank, Journal, Vol. XX., p. 376.

2. As to the sudden jump in the amount paid in.

Bank notes £20 paid in on opening the account.

Next day, the stolen cheque for £786 18s. 3d.

The Privy Council saw nothing in this to arouse suspicion.

In Crumplin *v.* London Joint Stock Bank, 30 Times L.R., 99, *ante*, p. 69, Pickford, J., attached some importance to the fluctuations or rapid increase of the account.

In Morison *v.* London County and Westminster Bank, [1914] 3 K.B., 356, *ante*, p. 91, Lord Reading carefully analysed the account for several years, and came to the conclusion, justified in that case, that there was nothing extraordinary about it.

If significance is ever to be attached to the matter, it must be admitted that the Privy Council took a somewhat lenient view.

*Cf.* Guardians of St. John's, Hampstead *v.* Barclays Bank, *post*, p. 282.

3. The expression above cited, "It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting the cheque," seems to be based on the wording of sec. 82, "where a banker in good faith and without negligence receives payment for a customer of a cheque."

But it is impossible to circumscribe the absence of negligence to the mere receipt of the money. In the interest of the banker, the section has been definitely held to cover all preliminary stages of the collection, which it was sought to charge as independent wrongful dealings with the cheque. This necessary liberality of interpretation must be reciprocal: the banker, to obtain protection, must show that he has not been negligent in any matter leading up to the actual payment.

Many cases, some of them herein dealt with, have gone against the banker mainly, if not entirely, on the ground that he omitted to make proper inquiries when the account was opened or to follow them up, when made. The Privy Council appear to treat this as a matter of minor importance.

[IN THE KING'S BENCH DIVISION.]

## COHN *v.* BOULKEN.

36 Times L.R. 767. Journal, Vol. XLI, p. 275.

*Cheque drawn in Francs—Amount payable.*

THE plaintiff was endorsee of a cheque for 7,680 francs (Paris) drawn in London by defendant on the London County Westminster and Parr's Bank, Holborn Circus Branch, in favour of one Marcel or order. Plaintiff claimed payment at sight rate of exchange ruling on the day of presentation, May 7th, 1920. Defendant set up an agreement between himself and Marcel, the payee, that the cheque should be paid at the rate ruling on April 28th, 1920. Counsel for the defendant also raised the defence that the cheque was not for a sum certain in money, that the document was therefore not a negotiable instrument, and that the plaintiff took it subject to all the equities attaching to the document. The Bills of Exchange Act, 1882, sec. 72 (4), lays down a rule in such a case for bills "drawn out of but payable in the United Kingdom," but is silent as to inland bills and cheques.

Evidence was given that it was the settled practice of bankers to debit the drawer of such cheques with the amount in sterling at the rate ruling on the day and at the hour of presentation, and to give the payee the equivalent in sterling. In the event of any dispute arising as to the rate ruling on that day, it was the practice to give the payee a cheque on Paris for the face value of the instrument.

The Judge ruled that the document was for a sum certain, and therefore a cheque, and that the drawer could not set up in evidence any agreement between himself and the payee as to the rate at which the cheque should be paid. Judgment was given for the plaintiff at the rate of exchange ruling on the day of the trial.

*Note.*—Later cases decide that the exchange should be calculated at the rate obtaining at the date of the breach; in this case, on the day of presentation. See Ulendahl *v.* Pankhurst, Wright and Co., 39 Times L.R., 628, *post*, p. 291, where this case was not followed.

Section 72 (4) did not apply as the cheque, although in foreign currency, was drawn in London.

[IN THE KING'S BENCH DIVISION.]

## BAKER *v.* LLOYDS BANK.

Reported. [1920] 2 K.B. 322. Journal, Vol. XLI, p. 276.

*Insolvency—Deed of Assignment—Banker's Lien in respect of Bills of Exchange not due.*

Fry and Co., customers of the bank, being insolvent, assigned all their property on February 3rd, 1914, to the plaintiff as trustee for their creditors. The deed provided that payments to creditors should be made according to the rules applicable in a distribution in bankruptcy. At the date of the deed, Fry and Co. had a credit balance of £2,934, and the bank held certain shares charged to them. The bank also were the holders of certain current bills of exchange which they had discounted before February 3rd, 1914, and on which Fry and Co. were liable as acceptors, drawers or endorsers. Subsequently, Fry and Co. became debtors to the bank in respect of these bills to the amount of £19,941, and the bank sold the securities, which realised £812. The plaintiff, who was the trustee under the deed of assignment, brought this action against the bank for the recovery of the credit balance, £2,934, and the amount realised by the securities, £812. The bank claimed a lien on these sums and a right to set off a sufficient portion of the amount owing on the bills of exchange.

Counsel for the plaintiffs argued that at the date of the deed of assignment and notice to the bank, there was no existing or ascertained debt due to the bank in respect of the current bills, but only a contingent liability, and quoted authorities to show that a banker's lien can only be exercised in respect of an actual liability. Roche, J., in his judgment stated that the matter turned mainly, if not entirely, upon the construction of the deed of assignment. The bank were assenting parties to the deed and relied upon the clauses which provided for payment to be made to creditors upon the basis of a bankruptcy division of the property, and that secured creditors were to have the same rights as they would have under a bankruptcy. In his judgment the bank was right and justified in relying upon those clauses. The plaintiff contended that these clauses did not assist the bank because at the date of assignment the liability of the firm in respect of the bills was only

contingent. It was true that this liability was contingent in that the amount that would become due was not ascertained, but it was certain that there would be a deficiency because the firm had at the time of the assignment declared themselves insolvent.

There was one other matter he should mention. The bank had assented to the deed of assignment upon the basis of their debt being dealt with in the manner he had dealt with it in this judgment. He was satisfied that the bank never would have dreamt of assenting to the deed had they been otherwise dealt with. It was hardly disputed that in bankruptcy they would have been entitled to these rights. He was satisfied they never would have waived the rights which they would have enjoyed under bankruptcy, but would have put the firm into bankruptcy. There would be judgment for the bank, with the costs of the action.

*Note.*—In ordinary cases, a banker has no lien in respect of current bills he has discounted for a customer—Bowen *v.* Foreign and Colonial Gas Co., 22 W.R., 740. Where bankruptcy supervenes, it is different. The contingent liability constitutes a mutual dealing or credit, entitling the banker to retain an amount of the current account equivalent to that of the bill—Alsager *v.* Currie, 12 M. and W., 751. The same principle applies where a company with contingent liabilities on bills is being wound up. Companies [Consolidation] Act, 1908, sec. 207.

[IN THE CARDIFF COUNTY COURT.]

Journal, Vol. XLI, p. 386.

*Overdue Cheque.*

In a case heard in the Cardiff County Court, Judge Hall Kelly had to consider whether in the circumstances a cheque was overdue within the meaning of sec. 36 (2) and (3) of the Bills of Exchange Act, 1882. Those sub-secs. state that "when an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had. A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."

In this case the plaintiff, a licensed victualler, gave £15 on account to a man named Brown for a cheque for £50 payable to Brown's order and dated twelve days previously. On presentation the cheque was dishonoured, and Brown, who had obtained it by false pretences, disappeared. The Judge held that the cheque was overdue when the plaintiff cashed it, and that it should have excited suspicion, as it had been in Brown's possession for thirteen days, although he had told the plaintiff that he wanted money. The plaintiff could not, therefore, recover from the drawer.

*Note.* *Cf.* London and County Bank *v.* Groome, 8 Q.B.D., 288; Rothschild *v.* Corney, 9 B. and C., 388.

It must not, of course, be deduced that a cheque is necessarily overdue if it has been in circulation for thirteen days. It is a question dependent upon the particular circumstances of the individual case, and a cheque may well be in circulation for much longer periods, and yet not be overdue within the section. Neither must an overdue cheque for the purposes of negotiation and as between the parties to the cheque, be confused with an overdue cheque from the point of view of the paying banker. The fact that a bank declines to pay a cheque which has been in circulation for a year or more unless with the express authority of the drawer, has no direct bearing on the question whether a cheque is overdue within the meaning of sec. 36.

[IN THE COURT OF APPEAL.]

## BANQUE BELGE POUR L'ÉTRANGER *v.* HAMBROUCK AND OTHERS.

Reported. [1921] 1 K.B. 321. Journal, Vol. XLI, p. 316.

*Following Money into Bank.*

One of the defendants, Hambrouck, was in the employ of a customer of the Belgian bank and by fraud obtained sums of money from his employer's account which he paid to the credit of his own account at Farrow's Bank. Subsequently he drew sums out of this account and gave them to a Mdlle. Spanoghue, without valuable consideration. The Belgian bank claimed to follow the money into the hands of Mdlle. Spanoghue and to recover the amount from her account at the London City and Midland Bank, into which it had been paid. The London City and Midland Bank paid the money into Court and the case proceeded as between the parties really interested.

Salter, J., gave judgment that the money was recoverable, and the Court of Appeal affirmed this ruling.

The crux of the case was that Mdlle. Spanoghue obtained the money as a gift and for no consideration which the law could recognize. To hold that the money could not be traced would, as Lord Justice Bankes said, be "to assent to the proposition that a thief who has stolen money, and who, from fear of detection, hands that money to a beggar whom he happens to pass, gives a title to the money to the beggar, as against the true owner—a proposition which is obviously impossible of acceptance." The Court further intimated that there was no immunity for bankers and that, if traceable, the money could have been followed into the London City and Midland Bank.

*Note.*—This case exemplifies the application of the tracing order doctrine enunciated in Sinclair *v.* Brougham, [1914] A.C., 398. It is particularly noticeable because of the number of hands through which the money passed before being finally marked down in the woman's account at the London City and Midland, and for the declaration by the Court that it could have been reached even there.

[IN THE KING'S BENCH DIVISION.]

## DEY *v.* PULLINGER.

37 Times L.R. 10. Journal, Vol. XLI, p. 317.

*Bill Signed by Managing Director.*

Section 77 of the Companies (Consolidation) Act, 1908, states that "a bill of exchange or promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

The point at issue was whether "acting under its authority" meant acting under the express authority of the company or such authority as might be implied from the signer's relations to the company by a person dealing with it. In the particular case the person signing the bill was a managing director, and by the terms of the articles of association he could have been authorized to draw bills on the company's behalf. As a matter of fact he was not so authorized. The Court decided that "authority" meant authority express or implied, and that in accordance with the well-known rule of law as expressed in Royal British Bank *v.* Turquand and other cases, a person dealing with the company could not be expected to ascertain whether the powers possessed by a Board of Directors have in fact been exercised, and was entitled to assume that the managing director had been given the powers which the articles permitted him to have.

*Note.*—*Cf.* Premier Bank *v.* Carlton, [1909] 1 K.B., 106; Underwood, Ltd. *v.* Bank of Liverpool; same *v.* Barclays Bank, 40 Times L.R. 302, *post*, p. 323.

[IN THE CHANCERY DIVISION.]

## HUDSTON *v.* VINEY.

Reported. [1921] 1 Ch. 98.

### *Priority of Mortgages.*

THE facts were that the bank had taken a legal mortgage from Hudston of property upon which the trustees of a marriage settlement had an earlier equitable charge, and the equitable mortgagees claimed priority over the bank's legal title on the ground that the bank had been grossly negligent.

The general rule of law is that a legal mortgage has priority over an earlier equitable mortgage of which no notice has been received, but, as laid down in the case of Oliver *v.* Hinton ([1899], 2 Ch. 264), the legal mortgagee may be deprived of his priority if he should be guilty of such gross negligence as to make it unjust that he should retain his priority. In that case the gross negligence consisted in the fact that the legal mortgagee did not insist on the production of the title deeds. In the present case the bank obtained possession of the principal title deed, but it was admitted that they did not investigate the title, and it was contended that had they done so they would have discovered the prior equitable charge, of which therefore they must be held to have constructive notice. Mr. Justice Eve, however, refused to take this view, and though he declined to lay down any general principle, he held that in the circumstances the bank was not grossly negligent and was not therefore deprived of its priority.

*Note.*—*Cf.* Conveyancing Act, 1882, sec. 3; Coleman *v.* London County and Westminster Bank, [1916] 2 Ch., 353, *ante*, p. 142. Opinions will always differ as to what constitutes sufficiently gross negligence to oust the title of a legal mortgagee. The only conclusive fact would seem to be the not getting, or at the very least inspecting, the title deeds; *cf.* Grierson *v.* National Provincial Bank, [1913] 2 Ch., 18, *ante*, p. 60.

[IN THE COURT OF APPEAL.]

## LLOYDS BANK LIMITED *v.* DOLPHIN.

From the Times, December 2nd, 1920. Journal, Vol. XLI, p. 273, Vol. XLII, p. 3.

*Post-dated Cheque—Payment Stopped—Rights of Holder.*

THE sum of £1,500 and interest was claimed from the defendant as the drawer of a post-dated cheque dated July 22nd, 1919, on the London Joint City and Midland Bank for that sum. The cheque was drawn payable to the order of a Captain Barker, and was by him endorsed to the plaintiffs. He was overdrawn, and drew £1,300 more against this cheque. On or about July 22nd, 1919, the defendant countermanded payment of the cheque, whereby notice of dishonour was excused.

Defendant admitted that he drew the cheque for £1,500, but he said that Captain Barker obtained it from him by fraud and by reason thereof had never had any title to the cheque. It was stated that the defendant drew the cheque relying upon a representation made by Captain Barker that he was interested in the sale of a Rolls-Royce car, the property of Lord Dundas, a representation which was wholly untrue. When the dishonoured cheque was returned to Lloyds Bank, they sent it to Captain Barker, at his club. It lay there till after the commencement of the action. In giving judgment for the bank, Rowlatt, J., said that defendant gave the cheque to Captain Barker on July 15th and post-dated it July 22nd, and, he supposed, he did that to see whether Barker would carry out the transaction against which he had placed the money. But the giving of a post-dated cheque gave Barker the power to take it to his bank, and he took it there. He was already overdrawn, and he drew against it £1,300 more, so that the bank were out for over the amount of £1,500 at the time. The bankers were then in the position of the holders for value of the cheque. Apparently by an oversight they at once presented the cheque to the bank on which it was drawn and got it returned. They did that noticing, or not noticing, that Captain Barker's account was overdrawn; he did not care which. If they knew that it was overdrawn, yet the money was advanced on the strength of the cheque. When it came back they sent it to the payee. Why they did that he did not know. He was asked to draw

the inference that they gave it to him back, but why should he draw that inference? That they gave it to him back seemed incredible. It was lying at Barker's club in London in a letter until a few days previously, and all that time the bank were entitled to have it; it was their security; they were the holders all the time, and holders for value. It was said, lastly, that they were agents for collection. He did not understand that. If one's account was in credit the bank had no interest but to collect the money and to place it to the account, but if it was paid in by a customer whose account was overdrawn, it changed the position of a bank from being an agent for collection to a holder. There would be judgment for the plaintiffs with costs.

The defendant appealed.

The Court of Appeal allowed the appeal on the ground that the bank were not holders of the cheque, as it was no longer in their possession at the date of the commencement of the action.

*Note.* Presumably the bank returned the cheque to Captain Barker, the endorser, by way of notice of dishonour under sec. 49 (6).

Sir Mackenzie Chalmers' note to that sub-section is as follows: —"This sub-section approves a common practice of collecting bankers which was previously of doubtful validity." In the present case the bank were not acting as collecting bankers, as they had given £1,300 for the cheque, although they took it from a customer. But it illustrates the inadvisability of a banker who receives back dishonoured a cheque he has to collect for a customer parting with it to the drawer or any endorser other than the customer.

Besides this case, there are earlier authorities showing that a man cannot maintain an action on a bill, note, or cheque unless at the time he institutes it, that is, takes out the writ, he has actual or constructive possession of the instrument.

This must be regarded as settled, notwithstanding the provisions of sec. 43 (2) and sec. 47 (1), which give an immediate right of recourse to the holder on dishonour, which right of recourse, after the end of the day and on the fulfilment of the formalities of notice, where not excused, matures into an immediate cause of action—Kennedy *v.* Thomas, [1894] 2 Q.B., 759; Gelmini *v.* Morrigia, [1913] 2 K.B., at p. 552.

It is, however, rather hard if the principle is applied so as to override sec. 49 (6).

That section specifies as a legitimate and proper method of completing the right of action against an endorser the returning to him a dishonoured cheque. This involves parting with it. If there are endorsers prior to him, he is entitled to return the cheque to one of them by way of notice or to the drawer, and

each endorser who gets it has the same right. The sub-section is in no wise confined to collecting bankers.

No prior endorser could sue on it without having paid it. He would not be payee or endorsee, *i.e.*, last endorsee on the face of it, it would not have been negotiated back to him; nor, assuming the last endorsement to be in blank, has it been delivered so as to make any possessor a holder by transfer; *cf.* sec. 21 (2). Holder in due course is out of the question; a bill would be overdue, a cheque would bear evidence of dishonour.

Why, then, should a man who has simply availed himself of a statutory power be debarred from his remedy against someone who is then and there clearly liable to him, say the acceptor of a bill or a drawer who has stopped a cheque, until he can get the instrument back into his own possession, if he ever does so? There was only one endorsement on the cheque in Lloyds Bank's case, and it took them ten months to get it back.

If the person entitled cannot sue without the instrument, it is every endorser's interest that he shall not get it. Is he bound to track it down, recover it by an action for conversion or detinue before he can do anything?

Save for Lloyds Bank *v.* Dolphin, the cases establishing the necessity of possession at issue of the writ are long prior to the Bills of Exchange Act. Is it not possible to regard sec. 49 (6) as importing an exception to the rule?

Lloyds Bank had the cheque in their possession at the trial, but that did not help them. A cheque or bill usually has to be produced at the trial, but if shown to be lost, as it might well be held if the holder had parted with it and could not get it back, the judge has power, under sec. 70, to let the case go on without it, on indemnity, which, as shown above, would not, in the supposed circumstances, involve any serious liability.

As matters stand, sec. 49 (6) is misleading and dangerous.

Anyway, the banker's safer course is not to part with the bill or cheque except to a customer for whom it was being collected in the strict sense of the term, and who is not overdrawn. Even then the sub-section does not strictly cover the case of a cheque not endorsed by the customer, and in such circumstances some further intimation seems advisable. As to the banker's alternative course, see sec. 49 (13).

A judgment such as this, based on non-possession of the cheque at inception of the action, does not seem to debar a fresh action after the cheque has come to hand. The case was not decided on the merits so as to constitute *res judicata*.

[IN THE COURT OF APPEAL.]

## JOACHIMSON *v.* SWISS BANK CORPORATION.

Reported. [1921] 3 K.B. 110. 37 Times L.R. 674. Journal, Vol. XLII, p. 134.

*Money on Current Account not a Recoverable Debt until after Demand—Effect on Garnishee Process.*

A PARTNERSHIP was dissolved by death on August 1st, 1914. The sum of £2,321 was standing to the credit of the firm on current account at that date. No demand of payment had been made. The question in the action was whether, in these circumstances, there was, on August 1st, 1914, an immediately recoverable debt, affording to the firm a cause of action for money lent or money had and received against the bank.

The Court of Appeal decided that there was not, holding unanimously that a demand was necessary.

*Note.*—The facts of the case are not of general interest, being mainly concerned with the internal arrangements of the plaintiff firm.

The questions raised and determined are, however, of paramount interest and importance to bankers, the judgments constituting a new departure with regard to the current account.

The main points established by the judgments are as follows :—

1. To make a credit balance recoverable by law there must be a demand. The Court said : "We all think a demand is necessary."

Prior to this case, the rule was generally supposed to be that the relation was merely that of debtor and creditor, with the superadded obligation of honouring cheques, when there was a sufficient available balance.

If any such condition as "on demand" was imported, it was treated as nugatory, in the same light as "on demand" in a promissory note or with regard to money lent.

Further, by virtue of the opinion of Lord Lyndhurst, L.C., in the earlier stages of Foley *v.* Hill and the judgment in Pott *v.* Clegg, 16 M. and W., 321, and *in re* Tidd, [1893] 3 Ch., 154, bankers understood they had the right, though they seldom asserted it, of setting up the Statute of Limitations with regard to a credit balance dormant and unacknowledged for six years,

which presupposed the immediately recoverable nature of the debt.

In the Joachimson case, these authorities were distinguished or disregarded on the ground that the question of demand was not directly in issue or necessarily involved in their decision. This appears true, at any rate, of Foley *v.* Hill, where the real matter to be decided was whether or no the banker held the current account in a fiduciary capacity.

And there was counter-authority, perhaps more direct, for assigning the current account to the category of debts where previous demand is necessary, either from the nature of the debt or from the stipulation of the parties, express or implied, that such demand shall be made. See Watson *v.* Mascall, 13 M. and W., at p. 455. Brett, J., in Schroeder *v.* Central Bank, 34 L.T., N.S., 735, intimated his opinion that such was the case with the current account.

But the main reason which weighed with the Court of Appeal, and which must commend itself to bankers, was the dislocation of business which would theoretically ensue were the current account to be treated as an immediately recoverable debt without previous demand. The customer would be entitled to demand his money at any branch of the bank, irrespective of where his account was kept. If immediately recoverable, the debt must reciprocally be immediately repayable, and the banker would be justified in tendering to the customer the amount of his credit balance at any time or place, and then dishonouring outstanding cheques.

The Court adopted the reasonable, but somewhat unusual, course of formulating a series of provisions setting forth the relations or implied contract between banker and customer, including one for previous demand, such as they conceived essential to the conduct of business and necessarily to have been in the contemplation of the parties.

2. The Court held that the issue of a writ by the customer for the amount of his credit balance would be a sufficient demand without any previous request for payment.

This is difficult to follow, seeing that a writ presupposes an existing enforceable cause of action, which there would not be if demand is a condition precedent to action. If a customer adopted so unreasonable a procedure, the bank could pay the money into Court and the costs, if any, would be negligible.

3. Statute of Limitations.

It was expressed in and would have followed from this judgment that bankers cannot claim the benefit of the Statute in respect of a current account credit balance which has lain dormant and unacknowledged in writing or by payment of interest for six years.

It is not suggested, nor could it be, that this has any bearing on overdrafts, which in any case are not likely to come under the operation of the Statute.

4. Garnishee orders on current account.

The Court lay down that their judgment does not affect the existing procedure, Atkin, L.J., alone expressing any doubt in the matter.

But it is exceedingly difficult to see how this works in with the previous ruling as to demand.

Order 45 (1) only authorizes the application for and issue of a garnishee order *nisi* where there is a debt due or accruing due to the judgment debtor; the judgment creditor or his solicitor has to swear to the existence of such a debt, and the order is limited to such debts.

If previous demand is a condition precedent to the immediate liability, as the Court held, there is no debt due or accruing due till after such demand, which is on the same footing as notice of withdrawal of a deposit account, as to which see Cowley *v.* Taylor and others, 124 Law Times Journal, 569; Atkinson *v.* Bradford Third Equitable Building Society, 25 Q.B.D., 377.

The judgment creditor can make no demand. Even the order absolute does not make him a creditor of the garnishee—*in re* Combined Weighing Co., 43 Ch. D., 99. "A garnishee order does not operate to transfer the debt, and does not constitute the garnishor a creditor either in law or in equity of the garnishee"—*in re* Steel Wing Co., [1921] 1 Ch., 349.

Much less, therefore, can he pose as creditor of the bank before the order *nisi*.

O'Driscoll *v.* Manchester Insurance Society, [1915] 3 K.B., 499, on which the Court of Appeal relied, is distinguishable. There it is expressly stated that there was no contingency which could happen to deprive the judgment debtor of the fees he had earned, on figures being finally adjusted. And in this O'Driscoll case, there are *dicta* by Bankes, L.J., which seem scarcely consonant with the view he takes in Joachimson's case. "If a sum of money is payable on the happening of a contingency, there is no debt owing or accruing." "The judgment creditor is only entitled to stand in the shoes of the judgment debtor." "If the order as expressed has the effect of expediting the date of payment, I think it is wrong." If the judgment creditor is able, in effect, to make a demand which the judgment debtor has not made and which is essential to fix the date of payment, that surely is expediting the date of payment.

The court seem to have somewhat slurred over this point. They say "service of the garnishee order *nisi* is, by operation of law, a sufficient demand to satisfy any right the banker may have as between himself and his customer to a demand before

payment of moneys standing to the credit of a current account can be enforced."

Very possibly that is so, but the question is whether, previous demand by the customer being necessary before the debt is due or accruing due, the customer not having demanded it, and the judgment creditor not being in a position to do so, there was ever any foundation for the garnishee proceedings at all.

The Court's idea seems to be to find a rough and ready way of maintaining the process; but in Whiteson *v.* Pitt and Stenning, [1911] 2 K.B., 418, Kennedy, L. J., at p. 431, says :—" It is no argument, I think, to say that upon the view contended for by the plaintiffs the County Court judge can find some way of working out the rule so as to do no injustice to the judgment debtor; the question is whether, under the terms of the rule, there is jurisdiction to allow these summonses to be issued."

The decision of the Court in the Joachimson case is, nevertheless, binding for the time being, and bankers must, as hitherto, treat a current account as affected by a garnishee order *nisi*, albeit there has been no previous demand for payment by the customer.

The decision does not profess to deal with or mention deposit accounts. The cases, cited above, decided specifically with regard to deposit accounts where a fixed period of notice was required, would seem to be still authorities, though there does not appear to be much essential difference between notice and demand.

It is difficult to place definite limits on the applicability and operation of the garnishee process as extended by the Court of Appeal. Atkin, L.J., suggests that, after service of the order *nisi*, there is ample power to provide for a demand being made before an order for payment is made. He does not specify what the power is or how it is to be exercised, whether directly by the Court, the judgment creditor, or by compulsion of the customer. Possibly he would say the same with regard to notice.

If the return of the deposit receipt is stipulated for, this introduces an additional feature which ought to turn the scale.

5. In his judgment, Atkin, L.J., includes a valuable summary of the mutual relations of banker and customer. It is as follows :—

" The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due, against the written order of the customer

addressed to the bank at the branch, and, as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer, on his part, undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine."

[IN THE KING'S BENCH DIVISION.]

## GILES *v.* KRUYER.

Reported. [1921] 3 K.B. 33. 37 Times L.R. 561.

*Notice of Appointment of Receiver.*

A PLAINTIFF who had obtained judgment in an action, but had not been paid his costs, was granted an order appointing two receivers, and served the bank where the defendant had a deposit account with notice of the appointment. Nothing further was done for nearly nine months, when the bank, hearing nothing more of the order, repaid the whole of the amount of the deposit to the defendant. The plaintiff thereupon applied for an order of the court that the bank should pay them £500 and interest, part of the deposit repaid by the bank to the defendant. Mr. Justice Greer dismissed the action on the ground that the mere notice of the appointment given to the bank was not binding upon them until the plaintiff had taken the necessary legal steps to include the bank in the order of the Court.

He said that the order appointing receivers, made in the absence of the bank, was *in personam* the judgment debtor only, not *in rem*, and operated only as an injunction to restrain the judgment debtor from receiving the money, not the bank from paying it. He quoted Lord Esher in *in re* Potts, [1893] 1 Q.B., 648 :—" If the order had charged the money in the hands of the executors and had ordered them not to pay it to Potts, but to pay it to the receiver, it might perhaps amount to an equitable charge."

*Note.*—In any case it appears inadvisable that after notice of appointment of a receiver, even by way of equitable execution, a bank should, without inquiry and advice, part with funds affected thereby.

[IN THE KING'S BENCH DIVISION.]

## NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND *v.* LINDSELL.

Reported. [1922] 1 K.B. 21. Journal, Vol. XLII, p. 366.

*Bill of Sale.*

THE facts were briefly these: L, a motor engineer, had at his works a car belonging to W, which had been repaired, the charges amounting to £280. W had authorised L to sell the car after the repairs had been carried out. W was also indebted to the bank for £300 odd, and, desiring further accommodation, he applied to the bank. The bank agreed on condition that he authorised L to hold the car, or, if sold, the proceeds thereof, to their order. W accordingly instructed L to hold the car to the order of the bank "or the proceeds when sold, after deducting your account." The car was eventually sold for £515, out of which L retained the amount of his charges, £280. L, in the belief that W had, in the meantime, adjusted the matter with the bank, paid them £135 only and the balance of £100 to W. The bank, not receiving the whole of the £235 to which they claimed to be entitled, brought an action against L to enforce their rights as assignees.

*Held* that they could not recover, the letter being in effect a bill of sale and not having been registered as such.

*Note.*—The assignment of the proceeds of the sale of goods, not of the goods themselves, does not require registration as a bill of sale (see Walker *v.* Capital and Counties Bank, Legal Decisions Affecting Bankers, Vol. II, p. 275).

In the present case the letter to L went further and purported to transfer the property in the car as well as to assign the proceeds of its sale.

[IN THE COURT OF APPEAL.]

## *In re* G. R. WIGZELL. *Ex parte* D. HART *v.* BARCLAYS BANK LTD.

Reported. [1921] 2 K.B. 835. 37 Times L.R. 526. Journal, Vol. XLII, pp. 122, 367.

*Stay of Advertisement of a Receiving Order in Bankruptcy—Subsequent Transactions.*

THIS was an appeal from the decision of a Divisional Court, reported in the Journal, Vol. XLII, p. 122.

A receiving order was made against the bankrupt in the Edmonton County Court on October 8th, 1919. After the receiving order was made the bankrupt obtained a stay of the advertisement thereof pending an appeal to the High Court of Justice. The appeal was heard on November 10th, 1919, and was dismissed with costs. The order of adjudication was made on December 10th, 1919.

Between October 8th and November 5th, 1919, £165 2s. 3d. was paid into the bankrupt's account at the bank. During the same period £199 19s. 7d. was paid out on the bankrupt's cheques.

By sec. 11 of the Bankruptcy Act, 1914, notice of every receiving order is to be Gazetted and advertised in a local paper in the prescribed manner.

By sec. 74 (1) it is the duty of the Official Receiver to advertise the receiving order, and by rule 186 the Registrar is to forthwith give notice to the Board of Trade of the making of a receiving order and the Official Receiver has forthwith to send notice thereof to such local paper as the Board of Trade may from time to time direct, or, in default of such direction, as he may select.

No such or any notice appeared until after the appeal was dismissed, and the bank had no knowledge or suspicion that any receiving order had been made.

The trustee claimed that as the sum of £165 2s. 3d. was paid in after the receiving order, it became his money and that the bank were not entitled to credit themselves as against it with any of the £199 19s. 7d. paid out.

The County Court judge decided against the bank. The Divisional Court affirmed his judgment.

The bank appealed. The Court of Appeal dismissed the appeal.

*Note.*—The main ground of the bank's contention was that, on the principle established in *in re* Thelusson, [1919] 2 K.B., 735, *ante*, p. 211, and the cases there cited, the trustee, as an officer of and representing the Court, was bound to pursue a line of conduct which an honest man, actuated by motives of morality and justice, would pursue, although not compelled thereto by legal process; that the officer of the Court is bound to be even more straightforward and honest than an ordinary person is in the affairs of everyday life. That, in the words of Farwell, L.J., "it would be insufferable for the Court to have it said of it that it had been guilty, by its officer, of a dirty trick."

The Court of Appeal declined to accede to this contention.

Lord Sterndale, M.R., admitted that the principle *quâ* principle, existed; he said:—"It seems to me to have been established practically that there must be read into sec. 45 of the Bankruptcy Act, 1914, after the second proviso, a third proviso, 'Provided that the transaction, whenever it takes place, is one which it would not be honourable or high-minded for a trustee to impeach.'"

But, in a subsequent part of his judgment he uses words which seem somewhat incompatible with this. He says:—"It has been said that bankruptcy is the creation of statute, and that the decisions of the Courts have added fair-mindedness and high-mindedness to the actual words of the Act of Parliament; but this, to my mind, is asking us to give a protection which can only be given by the Legislature, and it is for the Legislature to consider whether or not it will give it." It is not very obvious what is the distinction between "honourable or high-minded" and "fair-mindedness and high-mindedness" or the relative effects, in this connection, of a proviso and an original enactment. Possibly the differentiation may be traced to the word "practically" in the first quotation.

The real ground of the Court of Appeal's judgment was that the trustee was not in a position to exercise high-mindedness or even fair-mindedness; he had a statutory duty to perform, namely, to get in for the creditors all that by law he could, that duty was not modified by statute so as to permit of moral considerations; neither the trustee nor the creditors he represented was or were the moving party in getting the receiving order suppressed, that was the doing of the bankrupt and the registrar; one of two innocent parties, either the creditors or the bank, must suffer; the law put the loss on the bank, and it must stop there. In the previous cases, in which the Court has disallowed the claim of the trustee, the subject matter was property which had been acquired by the bankrupt by unworthy means, whereby the assets had been increased. In the present case, the assets

had been diminished by the amounts drawn out by the bankrupt, when he knew that a receiving order had been made against him of which the bank knew nothing, means, one would say, describable as unworthy.

In *in re* Thelusson, *ante*, p. 211, Atkin, L.J., said: "It can make no difference whether the trustee himself has acquired the property by unworthy means or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means." Why should not the same reasoning preclude the rejection of a set-off or defence based on the unworthy conduct of the debtor?

It was said in this case that, if the bank's contention was admitted, anyone who had acquired or parted with property after receiving order and without notice thereof would be entitled to like relief.

But there were peculiar features in the Wigzell case. It was not one of mere ignorance of the receiving order; the ignorance was directly induced by the action of the Court in suspending the advertisement; the Court of which registrar and trustee alike were officers.

It was assumed throughout the case that the registrar could in his discretion suspend advertisement of the receiving order. That may be so; it is hardly deducible from the very imperative terms of the sections above quoted.

But registrar and trustee both represent the Court, are its officers. The registrar suspends the advertisement, the trustee takes advantage thereof. The Court let loose on the community the debtor with apparent power, and much temptation, to deal with the assets. If instead of banking the £165 2s. 3d. he had simply spent it, it would have been beyond recall. Is it consistent with natural justice to mulct the bank, his innocent agent, who would never have touched or parted with the money but for the suspension of the advertisement?

The British Bankers' Association submitted to the Government a short Bill protecting the banker up to such time as he received notice of the receiving order; but nothing has, so far, come of it, and the danger continues and cannot be counteracted.

Younger, L.J., suggested that the banker might be entitled to stand in the shoes of persons paid by the cheques drawn by the bankrupt and so prove in the bankruptcy. In any case, this would only be partial relief; if, as is not unlikely, the bankrupt draws out the money himself, the suggestion does not apply.

[IN THE KING'S BENCH DIVISION.]

## DIAMOND ALKALI EXPORT CORPORATION *v.* BOURGEOIS.

Reported. [1921] 3 K.B. 443. Journal, Vol. XLII, p. 303.

*Tender of Shipping Documents under c.i.f. Contract.*

By a written contract of August 7th, 1920, the Diamond Alkali Export Corporation of New York sold to F. Bourgeois of London 50 tons of soda ash. Shipment was to be September-October from American seaboard. Terms of payment were cash against documents under confirmed bankers' credit at London; price was c.i.f. Gothenburg. The buyers rejected the documents when tendered in London upon several grounds, viz. (1) that the sellers had not shipped the goods until November 8th and 9th, 1920; (2) that a proper bill of lading was not presented; (3) that a proper policy of insurance was not presented.

As regards the first of these contentions Mr. Justice McCardie held that the delay in shipment was covered by the strike clause contained in the contract. The second objection was to the form of the document which purported to be a bill of lading and which, as regards the contentious part of it, ran as follows :—" Received in apparent good order and condition from D. A. Horan to be transported by the S.S. Anglia now lying in the port of Philadelphia and bound for Gothenburg, Sweden, with liberty to call at any port or ports in or out of the customary route, or failing shipment by such steamer in and upon a following steamer, 280 bags dense Soda."

The judge held that this document was not a bill of lading within the c.i.f. contract of sale. He reviewed the recent decision of the Privy Council in the Marlborough Hill case ([1921] 1 A.C., 444), in which it was held that a " received for shipment " bill of lading was a bill of lading within the meaning of sec. 6 of the Admiralty Court Act, 1865, but he declined to extend this decision to a c.i.f. contract. Discussing the opinion expressed in the Privy Council judgment that " there can be no difference in principle between the owner, master or agent acknowledging that he has received goods on his wharf or allotted portion of quay or his storehouse awaiting shipment and his acknowledging that the goods have been actually put over the ship's rail," Mr. Justice McCardie said : " With the deepest respect I venture to think that there is a great difference between the two, both from a legal and business

point of view. Those differences seem to me clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion, a mere receipt for goods at a dock warehouse for shipment might well be called a bill of lading."

Turning to the last contention of the buyers, that a proper policy of insurance was not tendered, Mr. Justice McCardie pointed out that " it seems plain that a mere written statement by the sellers that they hold the buyers covered by insurance in respect of a specified policy of insurance is not itself a policy of insurance within a c.i.f. contract (see the Mambre Saccharine case, 1919, 1 K.B., 199, and Institute Journal, January, 1919, p. 4). It seems plain also that neither a broker's cover note nor an ordinary certificate of insurance is an adequate agreement within such a contract." (See Wilson, Holgate and Co. *v.* Belgian Grain Co., Institute Journal, Vol. XL, p. 262, *ante*, p. 209).

The document tendered to the buyers in the present case was as follows : " This is to certify that on the 8th of November, 1920, this Company insured under policy No. 2319 for D. A. Horan $5,790 on 280 bags 58 per cent. dense soda ash NY & L test valued at the sum insured shipped on board of the S.S. Anglia and/or other steamer or steamers at and from Philadelphia to Gothenburg. And it is hereby understood and agreed that in case of loss, such loss is payable to the order of the assured on surrender of this certificate. This certificate represents and takes the place of the policy and conveys all the rights of the original policyholder, etc. etc."

Mr. Justice McCardie held that this was not equivalent to a policy of insurance, and that " a document of insurance is not a good tender in England under an ordinary c.i.f. contract unless it be an actual policy and unless it falls within the provisions of the Marine Insurance Act, 1906, as to assignment and otherwise." He added : —" The difficulties indicated in this judgment can be easily, promptly and effectively met by the insertion of appropriate clauses in c.i.f. contracts."

*Note.*—In a case before the same judge some days later, Avon *v.* Comptoir Wegimont, the facts were as follows : A contract was signed for the sale of goods c.i.f., Antwerp, shipment to be " from U.S.A. ports during October." In October, the goods were delivered at a dock in New York to the shipping agents against a receipt stating that they were for shipment by a named vessel. They were not in fact shipped by such vessel, but were put on board another vessel which did not sail until November.

Held, that the buyers were entitled to reject tender of the documents.

*Cf.* Stein *v.* Hambro's Bank of Northern Commerce, *post*, p. 252, Scott *v.* Barclays Bank Ltd., *post*, p. 278, where this case was quoted and approved.

[IN THE HOUSE OF LORDS.]

## SUTTERS *v.* BRIGGS.

[1922] 1 A.C. 1. 38 Times L.R.30. Journal, Vol. XLII, p. 368.

### *Bankers as Holders.*

THE main issue in this case was whether money paid in settlement of a betting transaction by a bearer cheque crossed " not negotiable account payee only " could be recovered under sec. 2 of the Gaming Act, 1835. That section gives a right of recovery against " an assignee, indorsee, or holder " of the instrument, and it was contended, first, that this must be interpreted as meaning a holder for value; secondly, that the collecting banker was not a holder at all, but a mere agent for collection, and sec. 77 (6) read with sec. 77 (1) was relied on as showing that the banker had only specific power to cross under the former sub-section and was not a holder, who has general power to cross under sub-sec. 1. Section 82 was also referred to as indicating the collecting banker's position to be that of agent and not holder.

The House decided that the money was recoverable on the grounds that the statute of 1835 was not confined to a holder for value and that the collecting banker was a holder.

The Lord Chancellor (Lord Birkenhead) in his judgment said as follows :—

" The argument on this point, sec. 77 (6) and sec. 82, is that as the sub-section gives a banker power to cross a cheque sent to him for collection specially to himself, it necessarily follows that he would not have that power apart from the sub-section and is not a holder.

" It is implicit in such an argument that although a banker who is acting as an agent for collection has the major right of crossing a cheque specially to himself, he does not possess the minor right of crossing it generally, or specially to another banker, or of making it not negotiable. Therefore a country banker to whom a cheque is sent for collection may not cross it specially to the bankers acting as his agents even for the purpose of safeguarding it in transit. A decision involving such a consequence would effect a revolution in banking practice. This sub-section, which was not in sec. 5 of the Crossed Cheques Act,

1876, was possibly inserted *ex abundanti cautelâ*, lest it might be argued that the practice was unlawful as constituting a breach of the relation of principal and agent, inasmuch as it recognized only payment made to the agent.

"Nor does sec. 82 afford assistance to the appellant. I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent is not a 'holder.' On the contrary, the opposite inference is far more plausible, viz., that the protection becomes necessary because he is a holder and as such liable to an action for conversion. The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act, 1906, confers the same protection on bankers who by their action have made themselves not only 'holders' but holders in due course (Gordon case and Bowen, L.J., in National Bank *v.* Silke, [1891] 1 Q.B., at p. 429).

"Moreover, if bankers are not holders of cheques for which they are agents for collection only, they derive no benefit from sec. 27, sub-sec. 3, as the sub-section does not apply, even when there is a lien, to a person who is not a holder."

*Note.* It was a hopeless contention that the collecting banker is not the holder of a cheque. He is the indorsee in possession of it or the bearer thereof, a "holder" as defined in sec. 2.

Lord Birkenhead's inference that the protection of sec. 82 is necessary because the banker is holder is doubtful.

An agent whose agency involves him, however innocently, in a conversion of a bill is personally liable, whether holder or not.

In real collection, the banker acts as agent, but he cannot divest himself of the character of holder. There is nothing in the Gordon case incompatible with this or suggesting that the banker is any the less an agent because he is a holder, or that he loses the protection of sec. 82 so long as he acts in the former capacity. If, by crediting as cash, he is to be regarded as forfeiting the position of agent, then the Act of 1906 comes into play.

Lord Birkenhead's judgment does not involve, and must not be understood to mean, that in every case where a collecting banker becomes a holder or possessor for value of a crossed cheque he is entitled to the protection of sec. 82 by virtue of the Bills of Exchange (Crossed Cheques) Act, 1906. His use of the words "holder in due course" in this connection is misleading. If the banker is a holder in due course, he does not need the protection of sec. 82 at all.

The Act of 1906 deals with the case of a banker who, before receiving payment, has credited a crossed cheque as cash to a

customer who had no title, or a defective title, to it, and with that case only. If it is a question of forged endorsement, the banker is never holder at all, let alone holder in due course, but he is protected all the same.

But if he otherwise takes the cheque as transferee, as in reduction of an overdraft, or by cashing it over the counter by way of exchange, neither sec. 82 nor the 1906 Act have anything to do with the matter, and if there be forged endorsement, he is liable in conversion, or money had and received.

It will be noticed that Lord Birkenhead clearly recognizes that by crediting as cash, the banker makes himself holder for value, citing the Gordon case and National Bank *v.* Silke as authorities. He holds that the Act of 1906 was passed to give the banker protection in that character. This is the generally accepted view, and the one most favourable for bankers.

It has, however, been recently impugned by Astbury, J., in *in re* Farrow's Bank, *post*, p. 268 and by the Court of Appeal in A. L. Underwood, Ltd. *v.* Barclays Bank, *post*, p. 323.

In those cases it was held that, unless there is some arrangement or understanding entitling the customer to draw against the cheque at once, mere crediting as cash does not constitute the banker a holder for value.

See those cases and notes thereto.

[IN THE COURT OF SESSION.]

## CRERAR *v.* BANK OF SCOTLAND.

Journal, Vol. XLIII, p. 50.

*Return of Securities.*

Miss Crerar deposited with the Bank of Scotland 2,775 ordinary shares of J. and P. Coats, Ltd., as security for advances, and these shares were transferred into the names of the bank's nominees. After some fifteen years the advances were repaid and Miss Crerar claimed that she was entitled to have retransferred to her name the identical shares which she had originally deposited. Neither the bank, however, nor the stockbrokers who carried through the transaction had paid any regard to the individual numbers of the original shares. Throughout the whole course of dealing the bank always held, registered in the company's register in the names of the bank's nominees, shares sufficient to enable them at any moment to re-transfer shares equivalent to those pledged by any or all of their customers, and when the re-transfer was made any shares were inserted in the transfer, and it was unlikely, except by accident, that the customer received back the shares originally deposited. The system followed was that generally adopted by all banks and stockbrokers in Scotland.

The Court of Session upheld Miss Crerar's contention that the bank was bound to identify the shares deposited by particular customers, but gave judgment for the bank on the ground that in this particular case the plaintiff had acquiesced in the course followed by the bank.

*Note.*—An English Court is not bound to follow a judgment of the Court of Session, but it is believed that the practice of London banks is the same as that prevailing in Scotland, and if the issue should come before an English Court the decision of the Court of Session would probably carry great weight. The defence which saved the bank in this case, acquiescence by the customer, might not be always available.

It is difficult to see what object anyone could have in insisting on the return of any specific shares; which could have no material advantage over substituted ones.

Very possibly, the Scottish decision is right on technical

grounds; the shares were identifiable, and a pledgor has on payment a right to receive back the specific article pledged. If, however, a bank, in similar circumstances, were utterly unable to trace or restore the identical shares, it is to be hoped an English Court would discover a way out of the difficulty.

The depositor's claim would be for detinue or conversion, and, in cases of that class, the ordinary remedy is damages, reducible on return of the goods. On payment of the damages, the property in the goods vests in the defendant. Specific return is only ordered where the article is unique or of special value to the claimant, as in the case of the Pusey horn. This cannot apply where the subject matter is merely part of a uniform issue of shares. The normal damages would be the market value of the shares at the date they were demanded back.

[IN THE KING'S BENCH DIVISION.]

## URQUHART, LINDSAY AND CO., LTD. *v.* THE EASTERN BANK LTD.

Reported. [1922] 1 K.B. 318. [1921] W.N. 364. Journal, Vol. XLIII, p. 84.

*Confirmed Bank Credit—Buyer's Instructions to the Bank to Refuse Payment—Damages against Bank.*

THE plaintiffs in this country arranged with a firm in Calcutta to manufacture and ship to them over a series of months a quantity of machinery, at prices mentioned in a *pro formâ* invoice, subject, however, to a stipulation that should the cost of materials, labour or wages advance there would be a corresponding advance in the prices to be paid by the buyers. The goods were to be paid for by means of a confirmed irrevocable credit to be opened by the buyers in favour of the plaintiffs with a bank in this country, who were to pay the plaintiffs for each shipment as it took place. In pursuance of this arrangement the defendant bank at the instance of the buyers issued to the plaintiffs a document by the terms of which the defendants undertook, up to a certain amount, and up to a certain limit of time to pay the plaintiffs, against bills drawn upon the buyers accompanied by corresponding invoices and shipping documents, the amount of such invoices. The credit was, by its terms, to be irrevocable and the invoices were to be for machinery. Having received the letter of credit, the plaintiffs proceeded to manufacture the machinery, and actually shipped two instalments of it, receiving payment from the defendants under the letter of credit against bills accompanied by invoices and other documents called for by that instrument. Before the third shipment was made the buyers, finding that the plaintiffs were including in their invoices an addition to the prices originally quoted, in respect to an alleged rise in the cost of wages or materials, instructed the defendants only to pay so much of the next invoices as represented the original prices. These instructions were obeyed by the defendants. The plaintiffs, however, refused to part with the documents representing their goods unless they received the full amount of the invoices, and on the defendants maintaining their position, the plaintiffs cancelled the contract with regard to

further shipments, as upon a repudiation by the buyers, and they brought the action claiming from the defendants as damages the loss on material thrown on their hands and loss of profits, that is, the same damages as they would claim against the buyers on the repudiation of the contract. After the action had been commenced the defendants paid to the plaintiffs the amount of the invoices, the original refusal of which had caused the dispute.

*Held*, (1) that the defendants committed a breach of the contract when they refused to pay the amount of the invoices as presented, they having undertaken to pay the amount of the invoices for machinery without qualification; and (2) the plaintiffs were entitled to damages calculated on the value of the materials left on their hands plus the cost of such as they would have further provided, and on the other hand what they would have been entitled to receive for the manufactured machinery from the buyers, the whole being limited to the amount they could in fact have tendered before the expiry of the letter of credit.

[IN THE KING'S BENCH DIVISION.]

## STEIN *v.* HAMBRO'S BANK OF NORTHERN COMMERCE.

Abbreviated from the report in Lloyd's List, December 10th and 14th, 1921. Journal, Vol. XLIII, p. 85.

*Confirmed Bank Credit—Buyer's Instructions to the Bank to Refuse Payment—Damages against Bank.*

COUNSEL for the plaintiff, in opening the case, said: "Mr. Enrico Stein (of Mincing Lane) was a merchant and exporter trading in Calcutta and London, and in October, 1920, he sold certain Dacca hides to a Mr. Reitti, of Venice, on c.i.f. terms, payment on a confirmed credit. The letter of credit was sent by the defendant bank, with whom it had been opened by the buyer Reitti, to the National Bank of India, the seller's bank, and it was upon that letter the plaintiff sued. It was dated January 14th, 1921, and said:—

"'We beg to inform you that a confirmed credit has been opened with us in favour of Enrico Stein for account of Mr. Reitti, of Venice, for an amount of about £5,000, available by drafts on us at three months sight against invoice, weight note and bill of lading per steamer "Caboto," leaving Calcutta about the middle of January, etc.'

"The words on which the dispute arose were 'per steamer "Caboto" leaving Calcutta about the middle of January.' The facts were that the contract with Reitti provided for shipment about the end of January, 1921, c.i.f. Venice per direct steamer of the Venezia Company, so the buyer named his line. Plaintiff endeavoured to secure a steamer in that line, and eventually he secured space on the "Caboto." He named the vessel, and the credit was at once opened. The "Caboto" was advertised to sail from Calcutta on January 15th, and so she was named in the letter of credit as leaving about the middle of January.

"Plaintiff engaged space, paid the freight and charges, put the goods on board and received bills of lading dated January 24th, 1921. The documents were sent forward all in order, but acceptance was refused and the action was brought. It was quite clear on the correspondence that Mr. Reitti, the buyer, was anxious to get out of his bargain, because the bottom had gone out of the market altogether by January and February, 1921.

and he instructed defendant bank not to honour the documents on the ground that shipment ought to have been made by January 15th.

"Shortly after he took the further point that the 'Caboto' had not in fact left Calcutta about the middle of January. Plaintiff shipped the goods on January 24th, but from one cause or another the 'Caboto' was detained and did not sail until February 19th. Mr. Reitti said that excused him and released the bank from all obligation in the matter."

Mr. Justice Rowlatt, in giving judgment, said :—"The question in this case is really this : Did the plaintiff comply with the requirement to present a bill of lading *per* the 'Caboto,' leaving Calcutta about the middle of January? As I understand it the commercial object of this sort of arrangement is that when a shipper has put his goods on board ship and got his bill of lading and documents, then he can get his money by reason of having the undertaking of an institution of standing on this side to accept his bills, and thereby being able to discount them with the bank on the other side. But that he has to get when his goods are put on board. If, after he has put his goods on board, and his right to have his letter of credit acted upon would seem from a business point of view to be an obvious right, he is then liable to be defeated because the steamer does not sail for some weeks afterwards in consequence of being detained in the River Hooghly by a strike, it seems to me the commercial object of this sort of arrangement is defeated.

"I am not, however, forced to that construction, though if it were necessary to adopt that construction I should do so; because it seems to me there is such an obvious other construction. This steamship 'Caboto' was a steamer in a line called the Veneziana Line, and the words in question seem to describe the 'Caboto,' that is to say, the mid-January Veneziana Line boat. It is proved that the 'Caboto' was advertised for January 15th. Defendants do not admit they knew it, and they tender evidence to the contrary which I have not thought necessary to receive. They do not admit they knew anything about the 'Caboto,' and I do not suggest for a moment they did. But we are here on a description in a bill of lading. The description 'per steamer "Caboto" leaving Calcutta about the middle of January' meant the mid-January ship, so I do not think there is any difficulty at all."

After listening to further argument on the question of damages, Mr. Justice Rowlatt continued :—"It seems to me that this is clearly a case of a simple contract to pay money upon the fulfilment of conditions which have been fulfilled. The bank had simply to accept the bill when the proper documents were

brought to them. They were brought to them. The plaintiff in effect put them down on the counter of the bank, asked for acceptance, and the bank would not give acceptance. Plaintiff rather than leave the documents there took them away again. There is no question arising as between buyer and seller as to the buyer having some opportunity of inspecting the goods or anything of that sort. The obligation of the bank is absolute, and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it. Therefore, it seems to me, the plaintiff's contention is right. No difficulty arises as to the discounting of the bill, because the action was not brought until after the date when the bill would have matured.

"Therefore, it seems to me the plaintiff is entitled to judgment for the amount of the bill, which should have been accepted, plus interest from the date it would have become due until to-day, and is entitled to the costs of the action. It seems to me that if the bank want the documents they have got to pay the charges, but I do not make any order about them. I also think the bank should overhaul their practice as to these letters of credit."

Leave to appeal was granted on terms, but does not appear to have been prosecuted.

[IN THE HOUSE OF LORDS.]

## HANSSON *v.* HAMEL AND HORLEY, LIMITED.

Reported. [1922] 2 A.C. 36. Journal, Vol. XLIII, p. 182

*C.i.f. Contract—Tender of so-called Through Bill of Lading.*

THE House dismissed this appeal from an order of the Court of Appeal reversing a judgment of Mr. Justice Bailhache.

The question raised by the appeal was whether certain documents tendered by a vendor under a c.i.f. contract as through bills of lading were proper bills of lading in compliance with the contract and such as the buyer was bound to accept.

The appellant in Sweden sold to the respondents in London 600 tons of cod guano to be shipped from Norway to Japan c.i.f. Kobe or Yokohama, payment net cash against documents in London. The guano was shipped towards the end of April, 1921, in three different parcels from Trondhjem, Braatvag, and Christiansund, respectively, and as there was no direct communication from those ports to Japan the guano was carried by a local steamer, the "Kiev," to Hamburg, under a bill of lading dated April 22nd, 1920, and was there transhipped to a Japanese steamer, the "Atlas Maru," which carried it to its destination. The agent of the "Atlas Maru" at Hamburg, a Mr. Lind, undertook to issue through bills of lading of the goods as soon as they came into his possession, and he did issue bills of lading, bearing date May 5th, which the appellant tendered to the respondents on May 12th. The form of these bills of lading was as follows:—The document was headed "Through bill of lading" and it contained in the margin these statements: "From Braatvag according to bill of lading on the 22nd April, 1920," and it began thus, "Shipped in apparent good order and condition by Messrs. Hamel and Horley, Limited, on board the steamship 'Kiev' lying in or off the port of Braatvag and bound to Hamburg for transhipment into the Osaka Shosen Kaisha's steamship 'Atlas Maru' . . . 1,500 bags cod guano . . . to be delievered . . . at the port of Yokohama . . . unto order."

The respondents declined to accept these bills of lading on the ground that they were not such bills of lading as would fulfil the obligations of a vendor under a c.i.f. contract. The respondents

having refused to accept the bills of lading or to pay for the goods, the appellant sued them to recover the price. The amount of damages was agreed and the only question in dispute was the sufficiency of the bills of lading.

Mr. Justice Bailhache held that the through bills of lading by which the Japanese company took upon themselves liability for the whole voyage were properly tendered, and that they complied with the obligations of the vendor. He therefore gave judgment for the appellant.

The Court of Appeal (Lords Justices Bankes, Warrington, and Atkin), on the contrary, held that, as the vendor had not made a contract of affreightment in a form capable of being transferred to the buyers covering the whole voyage, the so-called through bills of lading were too late in point of time and were not a compliance with the obligations of the contract.

The seller appealed.

Lord Sumner, in giving judgment, said that a c.f. and i. seller, as had often been pointed out, had to cover the buyer by procuring and tendering documents which would be available for his protection from shipment to destination, and he thought that this ocean bill of lading afforded the buyer no protection in the interval of 13 days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg. The bill of lading by the "Kiev" was originally a contract with the appellant himself, and never was, nor in any normal course of business ever would be, tendered to the respondents. As there were not, he supposed, to be two contracts for carriage as far as Hamburg, this was strong to show that the appellant never intended the ocean bill of lading to be a contract of carriage from Braatvag to Hamburg. When documents were to be taken up, the buyer was entitled to documents which substantially conferred protective rights throughout. He was not buying a litigation, as Lord Trevethin (then Mr. Justice A. T. Lawrence) said in the General Trading Company's case (16 Com. Cas. at p. 101). These documents had to be handled by banks, they had to be taken up or rejected promptly and without any opportunity for prolonged inquiry, they had to be such as could be re-tendered to sub-purchasers, and it was essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. He was quite sure that, in the circumstances of this case, this ocean bill of lading did not satisfy those conditions. It bore notice of its insufficiency and ambiguity on its face; for, though called a through bill of lading, it was not really so. It was the contract of the subsequent carrier only, without any

complementary promises to bind the prior carriers in the through transit. The appellant's contract with Mr. Lind was not transferable by endorsement and delivery, nor was it tendered; the "Kiev" bill of lading he kept to himself, and endorsed to Mr. Lind under this own contract with him. He (Lord Sumner) did not suggest that tender of either document would have carried matters any further, but, as things stood, the buyer was plainly left with a considerable lacuna in the documentary cover to which the contract entitled him.

Lord Sumner added that though the document was called a through bill of lading, it was not really so, for no one contracted by it for the carriage from Braatvag to Yokohama. Accordingly he expressed no opinion adverse to the sufficiency of through bills of lading, properly so called, as a tender under a contract like this.

Appeal dismissed.

[IN THE IRISH COURT OF APPEAL.]

## READE *v.* ROYAL BANK OF IRELAND.

[1922] 2 I.R. 22. Journal, Vol. XLIII, p. 197.

*Countermand of Cheque by Telegram.*

THE drawer of a cheque on the respondent bank telegraphed to the bank "Stop my cheque 50635, drawn for McEntyre, Reade." It appeared that the drawer had two accounts and that, by an error on the part of a clerk in the bank, the "stop" was registered in one account but not in the other, with the result that the cheque was paid on presentation. For the bank it was contended that the telegram was not an effective countermand, but the Court declined to take this view and judgment was given against the bank.

*Note.*—In the English case of Curtice *v.* London City and Midland Bank, [1908] 1 K.B., 293, Legal Decisions Affecting Bankers, Vol. II, p. 156, it will be remembered, the telegram was put into the bank letter box and not discovered until after the cheque was presented and paid. The Master of the Rolls held that, though the bank might have been negligent, there was, in fact, no countermand of payment in the circumstances. He went further than this and said "A telegram may reasonably and in the ordinary course of business be acted upon by the bank, at least to the extent of postponing the honouring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque."

Any apparent discrepancy in the two judgments disappears on examination, for it has never been supposed that the judgment in the Curtice case could justify a bank in ignoring or overlooking a telegram purporting to countermand the payment of a cheque, once it has admittedly reached their hands.

[IN THE CHANCERY DIVISION.]

## *In re* NORTH WALES PRODUCE AND SUPPLY SOCIETY, LTD. *Ex parte* PRIDDLE.

Reported. [1922] 2 Ch. 340. Journal, Vol. XLIII, p. 197.

*Debentures issued by Industrial and Provident Societies.*

THE Society was registered under the Industrial and Provident Societies Act, 1893, and borrowed money from Priddle, giving him a debenture secured by a floating charge to cover the advance. The Society was wound up, and the liquidator contended that the charge created by the debenture was void because it was not registered as a bill of sale. The judge decided that the Society, being registered under the Industrial and Provident Societies Act, was not a Company within the meaning of sec. 17 of the Bills of Sale Act, 1882, and that the charge upon the personal chattels of the Society, consisting of stock, furniture, vehicles, etc., was void, but that the debenture created a valid charge on the property of the Society other than such personal chattels.

[IN THE CHANCERY DIVISION.]

## ADMIRALTY COMMISSIONERS *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND, LIMITED.

38 Times L.R. 492. Journal, Vol. XLIII, p. 230.

*Recovery of Money paid to Bank in mistake of fact.*

In 1917 Merrill Samuel Taylor was serving as an officer in His Majesty's Royal Naval Air Service. While so serving he executed an allotment note in respect of his pay which directed £20 a month, beginning in October, 1917, and payable on the last working day of each month, to be paid to the National Provincial and Union Bank of England, Limited, at 114, High Holborn. On March 31st, 1918, M. S. Taylor was transferred from His Majesty's Royal Naval Air Service to His Majesty's Air Force. On July 7th, 1918, he was killed.

After the transfer to the Royal Air Force, and in any case after his death, the sum of £20 a month was no longer payable by the plaintiffs, but, by mistake, both the transfer and death were overlooked by the plaintiffs, and the £20 a month was paid to the bank until the end of January, 1920. In all twenty-two payments of £20 were incorrectly made, amounting to £440. On March 4th, 1920, the plaintiffs, having discovered the mistake, claimed repayment of £440 from the bank, but the bank refused to pay until they had communicated with M. S. Taylor's executors or next of kin. Only a small part of the sum of £440 had been paid over to or on the order of M. S. Taylor, and the bank had a balance remaining in their hands of £417 10s. 3d. Letters of administration were granted to Samuel Taylor, the father of the deceased, in Saskatchewan, but such letters of administration had not been sealed in England. The bank first heard of the death of M. S. Taylor on receipt of the plaintiffs' letter of March 4th, 1920. They communicated with Samuel Taylor and by letter dated July 2nd, 1920, he requested the bank to pay him the money to the credit of M. S. Taylor.

On February 4th, 1921, the plaintiffs began this action against the bank, claiming repayment of so much of this sum of £440 as had not been paid over by the defendants to or upon the order of M. S. Taylor. Neither Samuel Taylor nor any other personal

representative of M. S. Taylor was made a defendant to the action.

Mr. Justice Sargant, in his judgment, said that what was suggested on behalf of the bank—and he must confess that he was surprised that it had been so strenuously urged—was that it was necessary before an order could be made against the bank that there should be before the Court the legal personal representative of the customer; and that, unless he was made a party, the bank were not protected and were liable to be sued over again, if the letters of adminstration were sealed in this country and proceedings brought by the legal personal representative. What further fact could be proved by the legal personal representative he (his Lordship) did not know, and it was not suggested that in fact there was any; but it was argued as a theoretical matter that moneys once placed to the credit of a customer's account were sacred and could not be dealt with under the order of the Court, even when it was shown that someone had paid money into the account in mistake of fact, except in the presence of the customer or his legal personal representative.

The case made by the Admiralty was that the amount sought to be recovered was paid in mistake of fact, and that the argument for the bank was founded on a misapprehension. In support of that contention, the Attorney-General referred first to Carey *v.* Webster (1 Strange, 418). In view of that case counsel, on behalf of the bank, accepted it as law that if a person made payment to an agent and he informed the principal of it, yet if the person making the payment could show that it was made by mistake of fact he could recover it without making the principal a party. Counsel accepted that as a general principle, but said that it was different in the case of a bank. With regard to that there was no case absolutely deciding the point, but the two cases cited of *in re* Bodega Company, Limited ([1904] 1 Ch., 276) and Kerrison *v.* Glyn, Mills, Currie and Company (81 L.J., K.B., 465), Legal Decisions, Vol. II, p. 243, contained observations which clearly laid down that banks were not in any different position from other agents, and he (his Lordship) could see no reason why they should be.

Counsel for the bank had cited a number of cases as to the special position of banks beginning with Joachimson *v.* Swiss Bank Corporation (37 The Times L.R., 534; [1921] 3 K.B., 110, *ante*, p. 233) from which he cited observations as to the general obligation of a bank arising from the relationship between bank and customer. These observations were in his (his Lordship's) view entirely immaterial here, and were exclusively directed to the ordinary normal relationship between bank and customer. They had nothing to do with a payment by mistake of fact to the credit of a customer,

and the observation of Lord Justice Bankes was entirely applicable when he said : "Too much reliance must not be placed upon the language of learned Judges who had not the precise point before them." In his (his Lordship's) opinion, any contract by which a bank agreed to honour cheques of the customer on his current account did not extend to amounts standing to the credit of that account if and so far as it was swollen by an inadvertent payment made in mistake of fact.

The result of the order he proposed to make would be that the current account would be depleted by the amount which he directed to be refunded to the Admiralty. That would in fact reduce it to nothing. Any action brought subsequently by the father of the deceased officer would be without any reasonable chance of success. He would order repayment of the sum of £417 10*s.* 3d. to the Admiralty, subject to the deduction from that sum by the bank of their costs.

*Note.*—In Steam Saw Mills *v.* Berry Bros. (W.N. January 7th, 1922) where such a claim was made, the Court of Appeal held that the bank were entitled to keep the money in their hands, but must undertake not to part with it without notice to the plaintiffs and without an order of the Court, the application having been made in the absence of the party mainly interested. There may have been doubt as to the mistake of fact. In the case above reported, judgment was given against the bank, though the representatives of the deceased customer were not before the Court, Sargant, J., saying that any action by them against the bank would be without any reasonable chance of success. *Cf.* Sinclair *v.* Brougham, [1914] A.C., at p. 433, *per* Lord Dunedin. It is further deducible from Kerrison *v.* Glyn, Mills and Co., 17 Com. Cas., 41, *ante* p. 10, that the mere fact of having received the money as agent does not in any way preclude personal liability. *Cf.* Scottish Metropolitan Assurance Co. *v.* Samuel, The Times, July 22nd, 1922.

It would be unreasonable if the bank had to fight a losing case for the benefit of the customer. When the mistake is unquestionable, the bank would probably be safe in paying without reference to the customer. When in any way doubtful, they should get in touch with the customer, take steps to bring the money into Court or undertake to hold it till further order, and let the interested parties fight the question (cf. Banque Belge *v.* Hambrouck, [1921] 2 K.B., 321, *ante*, p. 227).

If outstanding cheques are presented which there is not sufficient surplus to meet, the situation is a difficult one, and the banker's course will probably be guided by his knowledge of the customer and his financial position.

If the bank has really altered its position in reliance on the

payment before notice of the mistake, it cannot be called on to refund.

If the payment has been notified to the customer, and he has definitely altered his position in reliance thereon, the bank will not be entitled to debit him. Holt *v.* Markham, [1923] 1 K.B. 504, *post*, p. 293.

The estoppel is based on representation, and it would seem immaterial whether the mistake originated with the bank or not. Such estoppel would presumably constitute sufficient alteration of the bank's position to preclude its having to refund, even if the money had not been actually drawn out.

[IN THE CHANCERY DIVISION.]

## *In re* DAVID ALLESTER, LIMITED.

Reported. [1922] 2 Ch. 211. Journal, Vol. XLIII, p. 282.

*Pledge of Goods—Re-delivery on Trust Letter—Validity.*

THIS was a summons taken out by the liquidator of David Allester, Limited, wholesale seed merchants, which raised a question of great interest in commercial circles.

It is the custom when merchants have raised money by advances from banks on the pledge of goods by delivery of bills of lading, invoices, insurance policies, or other documents of title for the banks to allow the pledgors, when it is desired to realise the goods pledged, to effect such realisation, and for that purpose the bank returns to the pledgors the documents of title, upon the pledgors giving to the bank a document undertaking to sell the goods on behalf of the bank and to hold the proceeds on account of the bank. This practice has been adopted for more than 20 years, and is beneficial; as the pledgors, being experts in the particular class of goods, can probably dispose of them to greater advantage than the bank could.

In the present case David Allester, Limited, had for some time had transactions with Barclays Bank, and at the time of the liquidation there had been such realisations of goods by the company on which the bank claimed that about £3,500 was due to them. The form of document used by Barclays Bank was in the nature of a letter addressed to them by the company in the following form :—

"To Barclays Bank Limited.

"Gentlemen, We have to acknowledge receipt of invoice, bill of lading, and copy of insurance policy (or delivery order) representing . . .

"We receive the above in trust on your account, and we undertake to hold the goods when received, and their proceeds when sold, as your trustees. We further undertake to keep this transaction separate from any others and to remit you direct the entire net proceeds when realised, but not less than . . . (the amount of the loan) within 28 days from this date. We undertake to cover the goods by insurance against fire and to hold the policy or policies on your behalf.—Yours faithfully."

This document was held by the bankers with the original document creating the pledge until they received the amount of the loan. The liquidator took out this summons in the liquidation for directions whether the bank was entitled to any priority in respect of its claims for either (*a*) the full amount of the proceeds of sale of goods pledged to the bank by the company before the commencement of the winding up of the company and released by the bank for sale by the company, or (*b*) the amount of moneys standing to the credit of the company or the liquidator in any banking account representing such proceeds of sale as aforesaid.

The liquidator claimed that the documents were not valid as against him in default of registration either (*a*) as bills of sale within sec. 4 of the Bills of Sale Act, 1878, as being "declarations of trust without transfer," or (*b*) under sec. 93 of the Companies (Consolidation) Act, 1908, as being a mortgage or charge of book debts of the company. He contended that under (*a*) they did not fall within the exception in sec. 4 of "any other documents used in the ordinary course of business as proof of the possession or control of goods."

Mr. Justice Astbury, in giving judgment in favour of Barclays Bank, said that the question was whether the giving of the document so operated as to deprive the bank of the security which it undoubtedly had under the previous pledge of the goods. The liquidator raised two points—(*a*) That the document was void in default of registration as a bill of sale, and (*b*) that it was void in default of registration as a mortgage or charge of book debts under sec. 93 of the Companies (Consolidation) Act, 1908. It was contended on his behalf on the first point that the document if given by an individual would require registration, as being "a declaration of trust without transfer," and that it was not covered by the exception in sec. 4 of the Bills of Sale Act, 1878, as being a document "used in the ordinary course of business as proof of the possession or control of goods." In his judgment the document did not fall at all within the definition in the Bills of Sale Act, 1878. The rights of the bank as pledgee were complete upon delivery of the bills of lading or other documents. The document in question was merely an authority given by the bank, and acknowledged by the company, under which the pledgees authorised the pledgors to sell. The rights of the pledgees did not arise under the document (see *ex parte* Hubbard). The bank as pledgee had the right to realize the goods from time to time, and it was more convenient to allow the realisation to be made by experts– here the pledgors —and the pledgee was entitled to do this (see North-Western Bank *v.* Poynter, Son, and Macdonalds [1895] A.C., 56).

If he was right as to this, it was unnecessary to consider whether the document fell within the exception in sec. 4, but if it were necessary to decide this, it seemed to him that *in re* Hamilton, Young and Co., [1905] 2 K.B., 772, was an authority for saying that such a document was used in the ordinary course of business as proof of the possession or control of goods. The liquidator's counsel had referred to the judgments in Dublin City Distillery *v.* Doherty, [1914] A.C., 823. In the present case the trust authority was wholly different from the documents in that case. The evidence that had been given by the assistant manager of Barclays Bank was sufficient to prove that the document was within the exception. Here the security already existed, and the document was only an authority to the pledgors to sell. In his opinion the point raised under the Bills of Sale Act failed, primarily because the documents did not fall within the definition of bills of sale in sec. 4.

As regards the second point whether the documents required registration under sec. 93 of the Companies (Consolidation) Act, 1908, the object of the section was perfectly plain. Counsel for the liquidator did not disguise the fact that if they succeeded on the language of the section they would upset a long-established custom in the City of London and other commercial centres. The answer to their contention, however, appeared to be that the document was no mortgage of or charge on book debts in any true sense. The bank had its charge before the document. The document was not intended to give a charge, but to enable the goods to be realised, as goods in such cases had been realised for years and years. It was suggested that it fell within Ladenburg and Co. *v.* Godwin, Fereira and Co., Limited, (see *ante*, p. 42) and the judgment of the present Master of the Rolls in that case. But the facts there were entirely different. There the bank had no pledge until the transaction, and that was undoubtedly a charge over book debts. The bank there had no previous right, the charge was explicit, and there was nothing to charge except book debts. The case did not appear to him to have any bearing on the present case. Here the bank, as pledgees, by the document created a trust agency for the purpose of realisation of the property. In no sense was the document a mortgage or charge within sec. 93.

Judgment for the bank.

*Note.*—The technicalities and pitfalls arising out of the Bills of Sale and Companies Consolidation Acts are so numerous and subtle that it is an advantage to have the precedent of any document which has received judicial sanction with relation thereto. The above form should therefore be noted for use in similar circumstances. The judgment is also valuable as a

judicial exposition of the earlier cases, and the somewhat shadowy distinction between a declaration of trust without transfer, a mortgage or charge of book debts, and the creation of a trust agency. An instrument very like the above, used as an original hypothecation note, was held bad in *in re* Townshend, 15 Cox, 466, as being a declaration of trust without transfer.

[IN THE COURT OF APPEAL.]

## *In re* FARROW'S BANK, LIMITED.

Reported. [1923] 1 Ch. 41. Journal, Vol. XLIII, p. 433.

*Clearance of Country Cheques after Suspension of Bank.*

THE Court dismissed this appeal. It was brought by the liquidator of Farrow's Bank from a decision of Mr. Justice Astbury (reported in The Times of July 20th, 1922), on a summons in the winding up, holding that Mr. H. J. Voyce, a customer of the bank and the payee of a cheque for £1,493 15s. 2d. which he had paid into his account at the Birmingham branch of the bank, was entitled to recover the whole sum from the liquidator of Farrow's Bank, and was not merely in the position of a creditor, entitled to prove for a dividend on the amount of the cheque in the winding up. The facts of the case were as follows:—

The cheque was drawn on the West Bromwich branch of the London Joint City and Midland Bank in favour of Voyce, and was paid by him to his account at the Birmingham branch of Farrow's Bank on December 16th, 1920. It was sent to Barclays Bank in London, who were the clearing agents of Farrow's Bank, and was received by them and sent to the Clearing House on December 17th. The cheque had been credited to Voyce's account at the Birmingham branch on December 16th. On December 18th the West Bromwich branch of the London Joint City and Midland Bank debited the cheque against the drawer's account. December 18th was a Saturday, and on Monday, December 20th, Farrow's Bank suspended payment about 8.30 a.m., and the bank and its branches were not opened on that day. At 12.30 p.m. the head office of the London Joint City and Midland Bank settled payment of the cheque with Barclays Bank, who at once credited Farrow's Bank with the amount. At 2.30 p.m. on December 20th Farrow's Bank presented their petition for winding up. In the meantime Voyce, on December 17th or 18th, had drawn against the sum which had been credited to him at the Birmingham branch on the cheque. It appeared that the pass-book supplied to Voyce stated that current accounts were accepted on the usual terms of bankers and that "proceeds of remittances are only available after receipt by the bank." The paying-in slip stated that the bank could

refuse to honour cheques drawn against cheques paid in until they had been honoured. Voyce in his affidavit said that there was no arrangement between him and the bank for drawing against cheques which had not been cleared.

The Master of the Rolls, dismissing the appeal, stated the facts, and said that what took place at the Clearing House in regard to the clearances of cheques was shown by an affidavit of the Secretary of the Institute of Bankers, Mr. Sykes, and from that affidavit it appeared that a cheque was said to be cleared when it had passed through the Clearing House and had been paid, and a final settlement had been made between the banks. It was important to know when Farrow's Bank received the money. If they received it before the suspension, then it was part of their funds, for the benefit of their creditors generally; if they received it after the suspension, then they had given up all their functions as bankers, and they had no right to receive it at all. A question had been raised whether they had received the money as holders of the cheque or as agents for its collection; the learned Judge below had decided that they held it only as agents for its collection, and no appeal had been brought against that decision. It might be added that they had, following their usual custom, credited Voyce in their books on the day when the cheque was paid in, though they, by their rules, reserved the right not to allow any drawing against the cheque until it was cleared.

Dealing with the matter as if Farrow's Bank had themselves been a clearing bank, it looked as if the money had not been actually received, and the relations between Farrow's Bank and Voyce had not been changed from agent and principal to debtor and creditor until the cheque had been definitely cleared, in the way indicated by Mr. Sykes. All that had been done was to enable the clerk at the West Bromwich branch of the London Joint City and Midland Bank to debit the drawer, and to deal with the matter as between that bank and Barclays Bank, and in his (his Lordship's) view, payment was not made, definitely, until the transfer in the books of the Bank of England placed the money at the disposal of the collecting bank. That appeared to be the right view if Farrow's Bank had been a clearing bank, but it was said that, although Barclays Bank had not received the money until December 20th, Farrow's Bank, their principals, had received it earlier—namely, when Barclays Bank had credited them, in their clearing sheet, with a right of recourse if the cheque were not met. If that simply meant that Farrow's Bank were entitled to draw against it, or to deal with it, that might be right, but there were not sufficient materials to enable the Court to say that the money was actually received. The appeal, therefore, failed.

Lords Justices Warrington and Younger agreed.

Appeal dismissed.

*Note.*—In this case, in the Court below, Astbury, J., said: "Since the Bills of Exchange Act 1906, it is not arguable that the mere crediting of a cheque paid into a customer's account, independent of any arrangement between the customer and the bank, converted the bank into a holder instead of an agent within sec. 82 of the Bills of Exchange Act 1882."

This is of course true, so far as concerns sec. 82, which was not involved in the case. There was, moreover, ample evidence, as pointed out by the Court of Appeal, that the cheques were only accepted for collection. If and in so far as the dictum of Astbury, J., implies that crediting as cash cannot constitute the banker a holder, meaning holder for value, it is opposed to general opinion and the view of Lord Birkenhead in Sutters *v.* Briggs, *ante*, p. 245, but supported by that of the Court of Appeal in A. L. Underwood, Ltd. *v.* Barclays Bank, *post*, p. 323.

See those cases and notes thereto.

[IN THE HIGH COURT OF AUSTRALIA.]

## COMMONWEALTH BANK OF AUSTRALIA *v.* ROSENHAIN.

From the Australian Insurance and Banking Record. Journal, Vol. XLIV, p. 87.

*Draft Payable with Interest until Arrival of Payment in London—Whether a Bill of Exchange.*

This was an appeal from a judgment by Mr. Justice Schutt in the Supreme Court of Victoria. The Commonwealth Bank sued Rosenhain and Co., of Melbourne, for the recovery of £1,656, an amount said to be due on a bill of exchange "and interest thereon." The bill was drawn in America by Caravel and Co. Incorp., negotiated in England, and received by the Commonwealth Bank in Melbourne. It was given in payment for goods sold by Caravel and Co. to Rosenhain. Rosenhain applied to have the writ set aside on the ground that the document was not a bill of exchange.

The defence relied on the grounds—(1) that the bill contained on the face of it words which showed that the document was not an unconditional order, and (2) that the bill provided for interest at the rate of 8 per cent. until arrival of payment in London "to cover." The Bills of Exchange Act, it was argued, required that a bill of exchange was to be for a "sum certain"; therefore the uncertain amount of interest deprived the instrument of the effect of a bill of exchange. Rosenhain & Co. also claimed that they had a counterclaim against Caravel and Co. Incorp. for a greater amount than the claim. It was held by the defence that this amount should be offset against the claim of the bank. Mr. Justice Schutt refused to set aside the writ.

The High Court of Australia now allowed the appeal (with costs) in the following judgment :—

The Instruments Act, 1915, of Victoria, secs. 91–101, provides a summary proceeding for actions under bills of exchange, cheques or promissory notes. Under these provisions the Commonwealth Bank brought an action against the appellants upon a document drawn by Caravel Company Incorporated in New York upon the appellants Rosenhain and Co. in Melbourne substantially in the following terms :—

Documents against acceptance,
New York, December 30th, 1920.

Sixty days after sight ——— pay to the order of Caravel Company Incorporated £1,471 10s. 7d. sterling, with interest at the rate of 8 per cent. per annum until arrival of payment in London to cover value received, and charge same to account of
Caravel Company Incorporated,
Henry Prout,
Assistant-Treasurer.

To Rosenhain and Co.,
563, Bourke Street, Melbourne, Australia.
Through London Joint City and Midland Bank.

The words " documents against acceptance " were typewritten at the top of the document outside a marginal black line which surrounded the other writing upon it. The document was endorsed in blank by the Caravel Company Incorporated, and ultimately by various endorsements to the Commonwealth Bank. The document was presented to Rosenhain and Co., who wrote across its face : " Sighted 28 2 21 and accepted, payable at the Royal Bank of Australia Ltd. as £1,471 10s. 7d., plus interest at 8 per cent. per annum." It was at a later date presented for payment, but was not paid. The bank subsequently, on the 17th October, 1921, issued its writ under the Instruments Act, as already mentioned, and claimed against the appellants £1,565 15s. 7d. as the endorsee of a bill of exchange. Particulars were supplied as follows :—

| | |
|---|---|
| Principal ... ... ... ... ... | £1,471 10 7 |
| Interest on £1,471 10s. 7d. at 8 per cent. per annum from Dec. 30th, 1920, to June 10th, 1921 (date of arrival of payment in London to cover on bill maturing May 29th). | |
| Interest June 11th. | |
| Notarial. | |
| | £1,565 15 7 |

But subsequently an affidavit filed on behalf of the bank stated that the claim for interest to June 10th was an error in calculation, and was three days in excess of what was said to be the customary period. The appellants obtained leave to enter a conditional appearance in and to defend the action. An appearance was entered by the defendants in the action without prejudice to an application on their part to set aside the writ and the service thereof upon the ground that the action commenced

by the writ was not an action upon a bill of exchange within the meaning of the Instruments Act. Schutt, J., heard the motion, but dismissed it, and from this dismissal an appeal has been brought by leave to this court.

The matter which requires decision is of no little commercial importance, for it turns upon the question whether the document on which the bank founds its claim is or is not a bill of exchange. If it is, the bank must, it is admitted, succeed; if it is not, the bank cannot succeed, and the appellants will be in a position to force an investigation of the accounts and cross claims between them and the Caravel Company Incorporated.

Now the term "bill of exchange" is defined, both in the Instruments Act and in the Bills of Exchange Act, 1909, in the same words as are contained in the Bills of Exchange Act, 1882, of Great Britain:

"A bill of exchange is an unconditional order in writing addressed by one person to another signed by the person giving it requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time *a sum certain in money* to or to the order of a specified person or to the bearer. The sum payable by a bill is a sum certain . . . although it is required to be paid . . . with interest." (See Instruments Act (Victoria), secs. 4, 10; Bills of Exchange Act, secs. 8, 14.)

The distinction between interest recoverable under the contract and as part of the debt and interest recoverable as damages must be borne in mind. The Bills of Exchange Acts themselves recognize the distinction (see Instruments Act (Victoria), sec. 10, Bills of Exchange Act, secs. 14 (3) 62). Clearly the interest dealt with in sec. 10 of the Instruments Act and sec. 14 of the Bills of Exchange Acts is that required by the contract to be paid. Clearly also these sections are dealing with the certainty of the sum payable. So far as that sum is concerned certainty is not destroyed because a definite rate of interest is not specified.

The same conclusion seems to have been reached before the Act (see Warrington *v.* Early, 2 E. and B., 763), possibly because the promise implied by the law was to pay a reasonable rate of interest, understood, in England at all events, from usage or the custom of merchants, or because of the usury laws or the practice of the courts, as 5 per cent. (see Byles on Bills, 15th ed., p. 444; Chalmers on Bills of Exchange, 8th ed., p. 30; Halsbury, Laws of England, Vol. II, p. 468).

The "sum certain" must, however, if the document is to constitute a bill of exchange, be payable on demand or at a fixed or determinable future time. "Certainty," as Ashurst, J., said in Carlos *v.* Farcourt, 5 T.R., 486, "is a great object in commercial instruments; and unless they carry their own validity

on the face of them they are not negotiable." Now the document under consideration did not fix a "determinable future time" for payment of the sums mentioned therein, but a fixed time, namely, "sixty days after sight." Consequently the sum must be certain at this fixed time if it is to conform to the provisions of the Bills of Exchange Acts. But clearly the sum was not certain on that date, nor could it be made certain from anything appearing on the face of the document, for interest was to run on from the time fixed for payment, namely, "sixty days after sight until arrival of payment in London," and it was quite uncertain, both on the face of the document and in fact, when this event would happen, or indeed whether it would happen at all.

If it be suggested that the document was payable "at a determinable future time," the uncertain contingency on which it became payable can be demonstrated from decided cases. Thus a document expressed to be payable "thirty days after the arrival of the ship 'Swallow' at Calcutta" or "ninety days after sight or when realised" could not be supported as a bill of exchange, for it is quite indefinite "when these uncertain events would probably be reduced to a certainty" (Palmer *v.* Pratt, 2 Bing, 185; Alexander *v.* Thomas, 16 Q.B., 333).

Another contention made for the appellant was that the document sued upon was not an unconditional order to pay money because it was conditional upon documents being handed over on acceptance. It is not necessary having regard to what has been said to determine what is the legal effect of the words "documents against acceptance" at the top of the document sued upon, and perhaps all the surrounding facts are not available for a proper determination of the question. It may be a direction to the banker who presents the document or a direction to or part of the terms of the transaction with Rosenhain and Co. But whatever its effect may be "it does not follow because the drawee is not bound to accept unless a condition is fulfilled that, when he has accepted, his transferable or negotiable promise to pay is not unconditional. It turns on the promise to pay" (Guaranty Trust Company *v.* Hannay and Co., 1918, 2 K.B., per Scrutton, L.J., at p. 666). And with the citation of this valuable opinion we may leave the point for further consideration in a case where it actually falls for decision.

Turning now to the ground upon which the learned judge below decided the case. He said "the words used in this document should be construed as meaning that interest is to be paid at the rate specified until the date when the bill falls due and for a further period arrived at by adding the usual period of carriage, which appears to be thirty-five days, to the period between the due date and the departure of the English mail next after the due date. The usual practice in Melbourne seems

to be in accordance with this view, and is, I think, based upon a proper interpretation of the words used." Under the ordinary canons of construction the court, "when once it is in possession of the circumstances surrounding the contract," should construe it according to its plain ordinary and popular meaning—its natural and literal meaning—unless there be some business custom or usage controlling or explaining the natural meaning of the words (see Cairns, L.C., in Bowes *v.* Shand, 2 A.C., at pp. 464, 468–469). A custom or usage of trade may no doubt be proved to attach unexpressed incidents to the contract, or to show that "words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that" (Brown *v.* Byrne, 3 E. and B., at p. 716). "In such cases the evidence neither adds to nor qualifies nor contradicts the written contract; it only ascertains it by expounding the language" (Brown *v.* Byrne, *ante*, ibid.). The custom or usage must not, however, be inconsistent with or repugnant to the expressed terms of the contract (Palgrave, Brown and Son *v.* Owners s.s. "Turid," [1922] 1 A.C., 397), nor could a custom or usage prevail against the provisions of the statute. Now, if Schutt, J., intended to say that the plain natural and literal meaning of the words in the document sued upon, relating to interest, is that which he assigns to them, we are unable to agree with him. The words are "pay . . . £1,471 10s. 7d. sterling with interest at the rate of 8 per cent. per annum until arrival of payment in London." They are plain and perfectly clear in meaning. Actual arrival is stipulated for, and there is nothing in the terms used to suggest, directly or indirectly, even a usual period of carriage, much less a definite period of thirty-five days. But from the argument before we gather that the learned judge rather intended to say that the words of the document were controlled or explained by a business usage, which he found, on the facts proved before him, to have been established. All these facts were proved by affidavit, and we are in as good a position to weigh them as was the learned judge himself. It is therefore our duty to give effect to our own independent judgment upon them.

On the one side it was sworn by bank officers of repute that in the case of documents such as the one in question here, providing for payment of a given amount together with interest "until arrival of payment in London," there was a recognized custom that the acceptor pays on the due date the amount and interest until the due date, and also interest for a period arrived at by adding thirty-five days to the period between such date and the then advertised date of departure of the English mail next after the due date of the bill. And apparently the number of days differed according to the country to which the payment was to

be remitted. On the other side it was sworn by bank officers of equal repute that the form of words adopted in the document sued upon had caused difficulties and proved embarrassing to bankers; and in collecting money under such documents, bankers, instead of awaiting the arrival of moneys in London and charging interest up to the date of such arrival, had, in order to avoid such difficulties and embarrassment, ascertained as nearly as possible the date when the outgoing mail to London next after the date appearing on the face of the document would arrive in London, and demanded interest until such date. The evidence on each side is probably an honest inference drawn from the practice actually followed, but as an interpretation of the facts the latter explanation is to be preferred to the former; it is a practical and probably a satisfactory method of estimating the probable amount of interest that would become payable under the document. Such a practice does not prove that the words are used in a sense different from their natural signification, but rather emphasizes that natural signification. If we thought that the facts deposed to in the affidavits supplied any foundation for the conclusion that the words used in the document before us had a customary meaning, *quoad hoc* (Bruner *v.* Moore, [1910] 1 Ch., 310), then we should have thought it desirable in the present case to consider whether the Bills of Exchange Act (apart from the special provisions of sec. 14) does not require that the sum certain in money be stated or indicated upon the face of the document itself, and also whether the custom or usage relied upon is not inconsistent with and repugnant to the terms of the contract between the parties. But as the evidence stands, we think that these important matters should only be decided in a case which calls for their decision.

The appeal must be allowed.

*Note.*—To be a valid bill, it must be for a sum certain in money and that sum must be payable on demand or at a fixed or determinable future time, sec. 3 (1). Under sec. 9 (1) the sum is certain though required to be paid with interest. It was held in 1887, in *re* Commercial Bank, 36 Ch. Div., at p. 529 that where no rate of interest is expressed, 5 per cent. is understood. In a Scottish case, Lamberton *v.* Aitkin, [1899] 1 Court of Sessions Cases, 189, a note for £250 " together with any interest that may accrue thereon " was held invalid, but the authority of that case seems doubtful. Anyway, it is imperative that the sum, principal and interest, should be fixed or ascertainable at the due date of the instrument and that date must also be fixed or determinable. A provision, as in the above case, that interest shall run on after the due date of the bill until the occurrence of an event, the happening or date of which is alike problematical, offends

against both these canons, and deprives the document of the character of a bill.

There is apparently no decision as to the effect of a drawer's writing on the bill "documents against acceptance" or similar words. Sir Mackenzie Chalmers (Bills of Exchange, 8th ed., p. 162) suggests that the terms of a documentary bill might be such as impliedly to authorize the acceptance of a bill against delivery of bills of lading, and the taking of such acceptance without discharging prior parties.

It is difficult to see, however, how an order can be unconditional in which the person giving it imports the performance of an obligation on himself or the subsequent holder without which the liability of the drawee is not to accrue.

Condition cannot be confined to a condition to be fulfilled by the drawee.

[IN THE COURT OF APPEAL.]

## SCOTT *v.* BARCLAYS BANK LIMITED.

Reported. [1923] 2 K.B. 1. Journal, Vol. XLIV, p. 143.

*C.i.f. Contracts and Certificates of Insurance.*

THE Court allowed this appeal from a decision of Mr. Justice Sankey (referred to in the Journal of the Institute for November, 1922, p. 359), in an action in which the plaintiffs, who carried on business at Leadenhall Street, London, claimed against the defendants £2,375 under a bill of exchange, payable at sight, dated December 14th, 1920, drawn by the plaintiffs on the defendants against a credit, which bill had been protested.

By their statement of claim the plaintiffs said that in January, 1920, they entered into a contract with Messrs. N. V. Machienfabrick en Scheepswerf de Waal Nymegen for the supply of one hundred tons of steel plates, according to the specifications set out in the contract, at £23 15s. a ton, c.i.f. Rotterdam. It was a term of the contract that the said Messrs. N. V. Machienfabrick should establish an irrevocable credit in England. In pursuance of that contract the defendants informed the plaintiffs by letter dated January 27th, 1920, that the Unie Bank voor Nederland en Kolonien, Rotterdam, had established a credit for account of the N. V. Machienfabrick in favour of the plaintiffs to the extent of £2,375, available for the plaintiffs' drafts on the defendants at sight. The letter also stated that the drafts were to be accompanied by a full set of clean bills of lading to order blank, endorsed and marked "notify Mr. Aric Schippers, Rotterdam," a certificate of inspection and tests by Lloyd's Register of Shipping, invoice, and approved insurance policy, including war risk, "for a shipment of a total of one hundred tons of steel ship-plates." By the said letters drafts under the contract were to be presented to the defendants not later than March 15th, 1920. The defendants, by that letter, agreed to honour all drafts drawn in conformity with the terms of the said credit on presentation. The duration of the credit was from time to time extended, and, finally, by letter from the defendants to the plaintiffs, dated September 22nd, 1920, was extended until December 15th, 1920.

The remainder of the facts appear in the judgment which follows.

Lord Justice Bankes, in giving judgment, said that this appeal raised several points of considerable commercial importance. A Dutch firm had entered into a contract with the representative of an English firm in Holland for the purchase of ships' plates, c.i.f. Rotterdam. As part of the arrangement it had been stipulated that payments should be provided for by a credit to be opened in London. As the result of instructions given by the Dutch firm the defendants issued a letter of credit on January 27th, 1920, in favour of the vendors. The present action was brought on an alleged breach of that letter. The contract having been made on c.i.f. terms, it was necessary that proper documents should be tendered, and the letter of credit specified what documents were required.

His Lordship then referred to the letter of credit for its terms, and said that on December 14th, 1920, a draft was presented to the defendant bank accompanied by invoices and other documents together with a certificate of insurance. The bank refused to honour the draft, with the result that the present action was instituted. The main objections originally taken on their behalf appeared to have been that the certificate of insurance even if regarded as a policy was for an amount stated in dollars and not in sterling, and, further, that the invoices did not conform to the letter of credit. Those objections were amplified at the trial of the action, and it was further urged that the certificate of insurance, which was said to have the effect of an approved policy, was not an insurance policy at all, that a full set of clean bills of lading had not been tendered, and that the drafts had been drawn in excess of the credit. All these points had come before the learned judge in the Court below. As to this he (the Lord Justice) desired to make this general observation. Having regard to the important part which letters of credit played in the commercial life in this country, he thought it was necessary to keep the system as free as possible from technicalities and from judicial *dicta* which were not essential for the decision of a particular case, and which might have an embarrassing effect upon business dealings in the future. In his judgment there were in this case two points free from doubt. He thought that the general principle applicable had been well stated by Mr. Justice Bailhache in Wilson, Holgate and Co., Limited *v.* Belgian Grain and Produce Company, Limited " (35 The Times L.R., 530; [1920] 2 K.B., 1). The question which he had to decide was whether the tender of a broker's cover note was a compliance with the obligation to tender a policy of insurance. At page 9 of the latter report, the learned Judge said :—

" It is, of course, clear that the buyer, if he chooses to do so, may waive his right to require a policy of insurance, and may agree to take some other document. If he chooses to adopt that

course, a document other than a policy can only be forced upon him if it is a document of the kind which he has agreed to take. He cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect."

It was true that this statement of the principle applied to the case of a buyer and seller, but where a banker issued a letter of credit he was entitled to the performance of all the conditions precedent before making payment thereunder, and if he required a full set of clean bills of lading and production of an approved policy he was entitled to those very documents, or at least documents which did not differ from them in any material respect. It was true that Mr. Justice Bailhache had also said, "I am not referring to American certificates of insurance, which stand on a different footing and are equivalent to policies, being accepted in this country as policies." What form of certificate the learned judge had in his mind he (the Lord Justice) did not know. It might be one which contained all the forms which were necessary for an English policy. He (the Lord Justice) desired to express no opinion on that point. He thought that Mr. Justice Bailhache's view must not be taken to apply to all American certificates in whatever form they were made out. Applying the general principle thus laid down to the facts of this case, he had come to the conclusion that the condition as to the tender of a full set of clean bills of lading had not been complied with, as only two had been tendered and not three. To tender two bills *plus* an undertaking or indemnity as regards the third was not a compliance with the terms of the letter of credit. Mr. Justice Sankey had treated that question as being one of no importance because on the evidence he regarded it as having been waived. In his (the Lord Justice's) judgment that non-compliance was sufficient to dispose of the case, but he did not rest his judgment on that question alone.

There was a second question which was also extremely important and which raised two subsidiary questions. That question was whether the certificate of insurance which had been tendered contained sufficient information to enable the reader to ascertain whether it amounted to an approved policy, and, further, the letter of credit being an English one, whether the policy referred to in the certificate meant a policy in English form which complied with English Law and was enforceable in England. He based his decision on the fact that the document was not one as to which anybody could say whether it complied with the requirements of the letter of credit or not. It was headed "Certificate of Insurance," and it stated: "This to certify that this company

insured under policy No. 10386 $2,304 on 100 steel plates per s.s. 'Lake Falama,' New Philadelphia to Hull," and further that "This certificate represents and takes the place of the policy." Thus it indicated the policy issued, but did not state what were the terms and conditions of the policy. These could only be ascertained by reference to the actual policy. This point had recently been discussed by Mr. Justice McCardie in the case of Diamond Alkali Export Corporation *v.* Fl. Bourgeois ([1921] 3 K.B., 443), where the certificate was in the same form as the one in this case. At p. 455 his Lordship said :—

"Now the certificate is not a policy. It does not purport to be a policy. It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. Those terms I do not know, nor is there anything before me to indicate that the buyer knew them. The certificate does not show whether that policy was in a recognized or usual form or not. The certificate does not therefore contain all the terms of the insurance. Those terms have to be sought for in two documents—namely, the original policy and the certificate. . . . This leads me to ask whether the document before me differs in any material respect from a policy of insurance. To begin with, I do not see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy and examined its conditions, whether usual or otherwise."

He agreed with that, and in his opinion it was a conclusive answer to the plaintiffs' claim. He desired to reserve his opinion on the question whether the certificate of insurance amounted to an approved policy. He thought that there was a good deal of force in the argument that the person who had to decide whether the requirements of tender had been complied with was entitled to have documents which were in compliance, but he could see many cases where it would cripple business if hard-and-fast rules were laid down in these circumstances. He also expressed no opinion upon the question whether a policy of insurance expressed in dollars was a good tender under a letter of credit in sterling. He rested his judgment on the sole question whether this certificate of insurance could be said to be a good tender. In his judgment it was not, and the appeal must therefore be allowed.

Lord Justice Scrutton and Lord Justice Atkin delivered judgments to the same effect.

Appeal allowed.

*Note.*—For the cases referred to in the above judgment see also as follows: Wilson Holgate & Co. *v.* Belgian Grain & Produce Co., *ante*, p. 209. Diamond Alkali Export Corporation *v.* F. Bourgeois, *ante*, p. 243.

[IN THE KING'S BENCH DIVISION.]

## GUARDIANS OF ST. JOHN, HAMPSTEAD *v.* BARCLAYS BANK LIMITED.

39 Times L.R. 229. Journal, Vol. XLIV, p. 198.

*Collecting Banker—Negligence in Opening an Account.*

THIS action was brought by the Guardians of the Poor of the Parish of Hampstead against Barclays Bank Limited for £416 17s. 4d. as money had and received to the use of the plaintiffs; alternatively the plaintiffs claimed damages for the alleged wrongful and negligent conversion of two orders for the payment of money drawn by the plaintiffs to the order of D. Stewart and Company. The facts were as follows :—

A stranger called on February 17th, 1922, at the defendants' branch in Oxford Street and, giving the name of Donald Stewart and an address in Fitzroy Square, stated that he wished to open an account. He was asked for a reference, and gave the name of a Mr. Woolfe, of whom the bank knew nothing. He paid in £15 in Treasury Notes, apologizing for the smallness of the amount and saying that he expected larger payments shortly. The bank would not give a cheque book until a satisfactory reply was received from the reference. On the following day the bank received a satisfactory reply purporting to come from Woolfe. The reply was admittedly a forgery. On the same morning the so-called Stewart came with the orders in question drawn on January 26th in favour of " D. Stewart and Company " or order and endorsed " D. Stewart and Company." He stated that he traded as " D. Stewart and Company," and that the orders were in payment of his account with the plaintiffs. A few days later he returned, obtained a cheque book and drew the proceeds of the two orders and then disappeared. The two orders had been stolen by a temporary employee of the plaintiffs. The real " D. Stewart and Company," linen drapers, were the only firm of that name in London. There was no one of that name at the address in Fitzroy Square, and although there was a man named Woolfe at the address given there was no evidence that he had anything to do with the matter.

The defendants pleaded sec. 82 of the Bills of Exchange Act, 1882, which provides as follows :—

" Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Counsel for plaintiffs submitted that the orders were not cheques within the meaning of the section, being drawn on the Treasurer of the Guardians, or alternatively, he submitted that the onus lay upon the defendants to show that they had not been negligent.

Mr. Justice Acton, in his reserved judgment, assumed in the bank's favour that these documents were cheques and that Stewart was a customer, but the onus was on the defendants to prove that they had not been negligent, and it was a question of fact. The test to be applied was " whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry." The reference, even if genuine, would only have been good for a genuine Donald Stewart, and the cashier took it for granted that the person calling himself Donald Stewart really was Donald Stewart. These facts had little importance on February 17th, but on the following day he appeared with the orders and represented that he was " Donald Stewart and Company." Of these matters the bank had no evidence whatever, and he might have been a mere dishonest servant of the genuine " D. Stewart and Company," or a thief from outside. It was a matter to put the bank on inquiry. A reference to a London Directory would have shown that there was no Donald Stewart at the address given, and further, the supposed Stewart having apologized for the smallness of the payment of £15, it was strange that the very next day he presented for payment into his personal account these large orders drawn twenty-three days previously in favour of " D. Stewart and Company." His lordship came to the conclusion that the bank had failed to prove that they acted without negligence, and that there must be judgment for the plaintiffs.

*Note.*—The learned judge evaded a difficulty by assuming the documents to be cheques, the question being immaterial in view of his finding that the bank had been negligent.

Apparently the documents were the usual form of instrument drawn by Local Authorities on their treasurer. A banking company cannot be treasurer (see Glen's Public Health Acts, p. 696, *in re* West of England and South Wales District Bank, *e. p.* Swansea Friendly Society, 11 C.D., 768.)

Consequently, orders must be and are drawn on an individual.

generally a bank official. Whether such official or not, he is not a banker. The document is not a cheque (Halifax Union *v.* Wheelwright, L.R., 10, Ex., 183) nor is it within sec. 17 of the Revenue Act, 1883. It cannot therefore be legally crossed.

The only possible argument would be that having issued the document ostensibly crossed and so having made it practically impossible for the money to be got except through a banker, the drawer is estopped from denying that the ostensible crossing protected the collecting banker. A somewhat similar line of reasoning seems to have commended itself to the Privy Council in Union Bank of Australia *v.* McClintock, [1922] 1 A.C., 240, with regard to bankers' drafts, which are also outside any of the crossing powers.

But the answer seems to be that any difficulty in getting the money is, in law, not existent and not recognizable.

If the crossing is a nullity, a paying banker, or any other drawee, could not and would not pay any heed to it, as is the actual practice with ostensibly crossed bankers' drafts. Refusal to pay a crossed banker's draft over the counter would be dishonour.

Again, statute law has given bankers protection on certain specified instruments, when crossed, to counteract risks imposed on the banker, in the public interest, by statute when the banker is dealing with those particular crossed instruments. An individual has no right to add to the category of such instruments.

The ingenious method by which treasurers who have paid on forged endorsement have been held entitled to charge their Councils has no analogy to the matter in question.

The test of negligence laid down in this case and cited from Commissioners of Taxation *v.* English, etc., Bank, *ante*, p. 220, if read literally, would seem confined to the date of paying in. As before stated, in the note to that case, to satisfy sec. 82, there must be no negligence throughout the whole operation of collecting.

It is curious to compare the judge's views as to the suspicious character of a large payment in the next day after the opening of the account with a small sum, with those of the Privy Council in the same case of Commissioners of Taxation *v.* English, Scottish and Australian Bank, [1920] A.C., 683, *ante*, p. 220.

It is difficult to dogmatize with regard to things unrecognized by law, such as pseudo-crossings, and perhaps there is something to be said in favour of the view that people who devise and use them should not be heard to say they meant nothing by them. But, as demonstrated by the present position of "account payee," there is much danger in according recognition to unauthorized innovations with regard to negotiable instruments.

[IN THE KING'S BENCH DIVISION.]

## SMITH *v.* COX AND COMPANY.

From the Times, March 9th, 1923. Journal, Vol. XLIV, p. 200.

*Dishonour of Cheque—Measure of Damages.*

In this action before the Lord Chief Justice and a special jury, in the King's Bench Division, the plaintiff, Col. T. P. Smith, sought to recover from Messrs. Cox and Co., bankers, damages for alleged breach of contract and libel. The alleged breach of contract was the defendants' refusal to pay a cheque drawn on them by the plaintiff, and the alleged libel was their marking the returned cheque "N.S."

The facts were as follows :—

On February 25th, 1922, when the plaintiff had a balance of £13 5s. 5d. at the bank, the defendants wrote to him that a sum of £50 had been paid into his account. On March 2nd he drew a cheque in favour of his landlady for £18 16s. 4d., and it was this cheque which the defendants returned marked "N.S." What had happened was that Messrs. Cox and Co. had two Col. Smiths as customers, and the £50 had been paid into the account of the other Col. Smith. The letter which the defendants had sent to the plaintiff informing him that the £50 had been credited to him was admittedly sent to him in error, and the plaintiff was misled by it.

Counsel for the defendants submitted that there was no case to go to the jury. He said that "N.S." on a cheque bore no defamatory meaning : it merely intimated that the drawer of the cheque had not sufficient funds in the account on which it was drawn to meet it. Any person might inadvertently draw a cheque when there were not sufficient funds. The other question, however, was of greater importance. The authorities showed that substantial damages in such a case could only be given to a trader. It had been held that in English law a farmer was not a trader, and it was evident that a retired Lt.-Colonel who lived at home on retired pay was still less a trader. Counsel cited cases in support of his contention that in the absence of proof of special damage, the plaintiff, who was not a trader, was entitled only to nominal damages of one shilling in an action against the bank for dishonouring his cheque.

Having reviewed the evidence, according to which the plaintiff drew his cheque on March 1st, handed it to his landlady on the following day, and did not receive the defendants' letter until the 4th, counsel for the plaintiff admitted that he had no case unless the pleadings were amended, and his lordship informed the jury that on the case as framed, and on the evidence given, the plaintiff was not entitled to succeed.

*Note.*—It is now generally recognized that, save in the case of a mercantile man or trader, only nominal damages can be recovered for dishonour of a cheque unless special damage is proved. As to libel by answer on a cheque, see Flach *v.* London and South Western Bank, *ante*, p. 123. The bank apparently admitted liability for dishonour, having misled the plaintiff by telling him £50 had been paid in. *Cf.* Holt & Co. *v.* Markham, [1923] 1 K.B. 504, *post*, p. 293; Holland *v.* Manchester and Liverpool Bank, 25 Times L.R., 386.

[IN THE KING'S BENCH DIVISION.]

## PROSPERITY LIMITED *v.* LLOYDS BANK LIMITED.

39 Times L.R. 372. Journal, Vol. XLIV, p. 201.

*Closing a Current Account—Reasonable Notice.*

THE plaintiffs claimed a declaration that the defendants were not entitled to close their banking account without giving the plaintiffs reasonable notice, and they asked for an injunction restraining the defendants from discontinuing the account. The plaintiff company was formed in June, 1922, having for its object the formulation of a "snowball" scheme of insurance (described in the report of this case in The Times).

The capital of the company was £500, the shares being taken by the three directors, Mr. Power, Mr. Coombs, and Lord Carrick. Shortly after the formation of the company the manager of the defendant bank at the Victoria Street branch was approached, with a view to the opening of a banking account. The scheme of insurance was explained to him in detail, and, on behalf of the defendants, he agreed to open an account there and to receive applications from subscribers to the plaintiff company and to allocate the moneys received from them in accordance with the rules of the plaintiff company. The account was opened, and at the material time there was a sum of some £7,000 deposited to the credit of the plaintiffs. On February 14th, 1923, a letter was sent by the head manager of the defendants to the plaintiffs telling them that the defendants would cease to act as bankers to the plaintiffs after March 14th, and the plaintiffs brought this action.

On behalf of the bank, it was contended that a banker could close his customer's account on giving reasonable notice, and that in the present case a month's notice was reasonable; that, in any event, the Court could not grant an injunction restraining a banker from refusing to continue a banking account, as it would be substantially a decree for specific performance of a contract of agency which the Court could not supervise.

Mr. W. W. Paine, one of the general managers of the defendant bank, in his evidence, said that his attention to the plaintiffs' account at the local branch was attracted by some criticisms of the "snowball" scheme of insurance which appeared

in the Press, and on investigating the matter he came to the conclusion that it was the duty of the defendant bank not to be associated with a scheme of this nature.

Mr. Justice McCardie, after stating the facts, said that there was no doubt that a banker had a right to close at any time an account which was in debit, but in the case of an account which was in credit he must give a reasonable notice, which would vary according to circumstances; and there might be special arrangements between the banker and the customer as to what notice would be required. In the absence of any special arrangement, he had to consider in the present case whether a month's notice was sufficient. The position of the defendants as bankers was interwoven with the scheme of insurance evolved by the plaintiff company; the result of the arrangement originally made with the manager of the defendants' local branch. It was after the account was opened that the scheme was launched. Many applications were made, and a large number of forms of application had been sent, according to which and in accordance with the rules of the plaintiff company, moneys of subscribers could only be received by Lloyds Bank, who had thought fit, however, to decline continuing to act as bankers to the scheme. No suggestion had been made that the scheme was a dishonest one: the directors were gentlemen of respectability, and nothing had been said against the way in which the business of the plaintiff company was carried on, but in his (his Lordship's) view, a scheme under which a subscriber who paid the sum of 35s. only obtained an insurance of 16s. was a scheme with which the defendants were justified in saying that they would not be associated.

Was a month's notice reasonable in the circumstances? Having regard to the nature of the scheme, and the number of forms of application which had been sent out, he had come to the conclusion that a month's notice was not adequate in the circumstances; it did not give the plaintiffs a sufficient opportunity to make fresh arrangements. The plaintiffs, therefore, would be entitled to the declaration asked for.

On the question whether the plaintiffs were entitled to an injunction, his Lordship, after referring in detail to the authorities, said that they were not so entitled, as an order for an injunction would be in the nature of a decree for specific performance, which it would be impossible for the Court to carry out; but, as no damages had been claimed, he would, if desired, give the plaintiffs an opportunity of claiming them by amending their writ.

After a discussion,

Counsel for the plaintiff company said that he and his learned friends had been able to arrive at an arrangement under which

the defendants had generously agreed to act as bankers to the plaintiff company for a further limited period.

The case was then settled on terms handed to his Lordship, and the matter terminated.

*Note.*—In his summary of the relation of banker and customer in Joachimson *v.* Swiss Bank Corporation, [1921] 3 K.B., 110, *ante*, p. 233 Atkin, L.J., says: "It is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice." He seems, however, to contemplate only such period of notice as may provide for outstanding cheques. *Cf.* Buckingham *v.* London and Midland Bank, 12 Times L.R., 70. The circumstances of the present case were exceptional and point to a possible danger with regard to banks who allow themselves to be nominated as agents for receiving subscriptions to commercial undertakings.

[IN THE KING'S BENCH DIVISION.]

## BRADFORD *v.* PRICE.

39 Times L.R. 272. Journal, Vol. XLIV, p. 216.

*Payment to an Agent.*

THE plaintiffs were coal merchants and employed a manager named Walley, from whom they had purchased a business which they carried on as a branch of their own. The plaintiffs had reason to suspect the honesty of Walley and sent a notice to their customers in the following terms: "Please note. This business having been transferred to Bradford and Sons, Ltd., Bournemouth, all cheques must be made payable to Bradford and Sons, Ltd., and not to G. T. Walley." The defendants, in spite of this notice, sent cheques in payment of coal made out to the order of G. T. Walley, or order, and crossed "Account payee only." Walley misappropriated these cheques and eventually committed suicide, and the plaintiffs sued the defendants for payment over again. Mr. Justice McCardie gave judgment for the defendants and quoted with approval an extract from Leake on Contracts, 7th ed., p. 675, as follows:—"An agent is not justified in accepting a cheque on behalf of his principal in lieu of a payment in cash unless he has authority to do so; but if an agent authorized to receive payment in cash accepts a cheque which is met upon presentation, and before his authority to receive cash is revoked, the debtor is discharged." It was admitted that the agent, Walley, was authorized to receive cash, and therefore his Lordship considered that he could receive a cheque in any form which permitted of its being turned into cash. The action could only have succeeded if the plaintiffs could show that their agent was prohibited from receiving cash or cheques except such as were drawn in a prescribed form, and that the defendants, though aware of this, had made out their cheques in some form other than that prescribed.

Judgment for defendants.

*Note.*—This is a puzzling case. If Walley had no right to receive cheques, the payment to him was not to an agent.

But, through the medium of the cheque, he did in fact receive cash, and that he was authorized to do.

[IN THE KING'S BENCH DIVISION.]

## ULIENDAHL *v.* PANKHURST, WRIGHT AND COMPANY.

39 Times L.R. 628. Journal, Vol. XLIV, p. 444.

*Contract—Sale of Goods—Action for Price—Price payable in Foreign Currency—Rate of Exchange—Date to be Taken.*

In an action for the price of goods sold and delivered, where the price is payable in a foreign currency, the rate of exchange to be taken is that prevailing at the date when the debt became due, and not that prevailing at the date of the verdict or judgment.

This action, brought by a German to recover the price of goods sold and delivered to the defendants in England, raised a question as to the date at which exchange should be calculated in case of non-payment by the purchasers. Proceedings were taken by the plaintiff under Order XIV.

The action was brought for 76,885·25 marks. The defence failed, and judgment was given for the plaintiff. The question then arose at what rate of exchange 76,885·25 marks should be converted into sterling.

Counsel for the plaintiff referred to the Volturno (37 The Times L.R., 969; [1921] 2 A.C., 544); Société des Hôtels, etc., *v.* Cumming (38 The Times L.R., 221; [1922] 1 K.B., 451); Lebeaupin *v.* Crispin (36 The Times L.R., 739; [1920] 2 K.B., 714); di Ferdinando *v.* Simon, Smits and Co. (36 The Times L.R., 797; [1920] 3 K.B., 409); and Cohn *v.* Boulken (36 The Times L.R., 767, *ante*, p. 223).

His Lordship, in his considered judgment, said that the defence had no merits, and the plaintiff recovered judgment. At the time when the defendants ought to have paid for the goods the rate of exchange was about 250 marks to the pound, but at the date of the judgment the figure was, of course, very different. The plaintiff's counsel had very properly drawn his attention to all the authorities, and he (his Lordship) had taken time to look into them. He would not now deliver an exhaustive judgment, but he felt that the weight of authority was clearly in favour of the view that the rate of exchange to be taken was that prevailing when the debt became payable, and not that prevailing when the action was tried. The judgment of Mr. Justice Acton

in Cohn *v.* Boulken (see *ante*, p. 223) appeared to be based on a misconception of the effect of Scott *v.* Bevan (2 B. and Ad., 78), and was, he thought, erroneous.

In actual practice the theory that the rate of exchange prevailing at the date of the judgment was that which must be taken would lead to great inconvenience. Clearly it was not so in a case of tort or of damages for breach of contract, and he did not see why it should be so in a case of debt. It would be most inconvenient if not only the dilatoriness of the parties in getting their action tried, but the accidents of the state of business in the Courts should affect the rate of exchange. He would point out that the phrase "the rate prevailing at the date of the judgment" should really be "the rate prevailing at the date of the verdict"; to-day verdict and judgment usually came together, but in the old practice judgment did not come until the first day of the term following that in which a verdict was obtained, and it was the verdict that was the important matter. There must be judgment at the rate of exchange prevailing when the debt became due; namely, for £313.

Judgment accordingly.

*Note.*—The rule as laid down here is now generally recognized. Whether the action be for debt, breach of contract, or tort, the amount recovered, if in foreign currency, is payable in English money at the rate of exchange ruling at the date the breach or cause of action arose, not at the date of the judgment.

This, as the learned judge points out, is the obviously fair and reasonable basis; it does not favour one party or the other, but is the natural outcome of the breach or wrong, and any other system would encourage a defendant or a plaintiff to gamble in exchange by delaying proceedings.

In the case of bills drawn abroad in foreign currency payable in England, the exchange is determined by the rate obtaining for sight drafts on the place of payment on the day the bill is payable (sec. 72 (4)).

The above judgment puts other causes of action on practically the same footing.

This case must be taken to supersede Cohn *v.* Boulken, 36 Times L.R., 767, *ante*, p. 223. The whole series of somewhat conflicting decisions is collected and ably reviewed in an article by Mr. J. H. Phillips in the Journal of the Institute, Vol. XLV, p. 35, January, 1924.

[IN THE COURT OF APPEAL.]

## HOLT *v.* MARKHAM.

Reported. [1923] 1 K.B. 504.

*Money had and received—Payment under Mistake of Fact—Alteration of Position of Payee—Estoppel.*

APPEAL from a judgment of Lush, J., at the trial.

The plaintiffs were army agents and bankers, and in February, 1918, were appointed by the Air Council as their agents for the issue of pay and allowances to officers of the Air Force.

The defendant, Col. R. G. L. Markham, had at one time been in the Royal Navy, having entered it in 1892, and he was serving in it as an engineer-lieutenant in 1900 when he resigned his commission. He was not put on the retired list; he received neither a pension nor gratuity; he left the Service altogether. In 1913, there being a scare of war, he offered his services to the Royal Naval Air Service, which were accepted. He was placed on the "Emergency List," but received no pay or emoluments until after the war had broken out. In August, 1914, he was given a "temporary commission" in the Royal Navy, being attached to the Air Service, with the rank of engineer-lieutenant. During the time that he was so serving he received the bonus of 25 per cent. on his pay to which officers on the Emergency List and holding temporary commissions were entitled in accordance with the regulations in that behalf. In 1918, the Royal Naval Air Service was amalgamated with the Royal Flying Corps and became the Royal Air Force. The defendant was then given a temporary commission in the Royal Air Force, but thenceforward he received no bonus on his pay. He was subsequently promoted, and became Commanding Officer at Yate. In August, 1919, he was demobilized, and on August 25th, 1919, he made an application for a gratuity, on the form applicable to an officer holding a temporary commission in the Air Force, as for a period of five years, from August 17th, 1914, to August 3rd, 1919.

By an Admiralty Order of 1919 an officer in the Royal Naval Air Service was entitled to 31 days' pay for every year's service or part of a year's service. By Art. 497 of the Royal Warrant of 1914 officers employed temporarily in the Army were entitled to a gratuity on the cessation of their employment: (a) "In

the case of an officer who retired with retired pay or gratuity 31 days' pay for every year of service or any part of a year." (b) " In the case of any other officer 124 days' pay for the first year of service or any part of a year and 62 days' pay for each subsequent year of service or part of a year." By an Order made under the Air Force (Constitution) Act, 1917, the provisions of Art. 497 above mentioned were applied to temporary officers of the Royal Navy transferred to the Air Force. By an Order of the Air Ministry dated February 2nd, 1919, and numbered 263, relating to war gratuities payable to officers transferred or attached to the Air Force, it was stated that " Gratuities on the following scales have been approved for all officers on the Retired or Emergency Lists, Royal Navy and Royal Marines, employed during the war :—For every year's service or part of a year's service . . . 31 days' pay." The rate of the defendant's pay was 40s. per day, and the plaintiffs, treating his case as coming within Art. 497 (b) of the Royal Warrant paid him on September 18th, 1919, the sum of £744, being 124 days' pay for the first year's service, and 62 days' pay for each of the four remaining years. Two-thirds of the said sum, namely, £496, they paid to him in cash, and one-third, namely, £248, in War Savings Certificates. On February 2nd, 1921, the plaintiffs wrote to the defendant that they had received a communication from the Air Ministry to the effect that the charge in their account of £744 for gratuity to the defendant was wrong, that as a retired R.N. officer he was only entitled to a gratuity under Art. 497 (a) of the Royal Warrant, and that the difference of £434 was disallowed. The plaintiffs said that they had looked into the matter and found that the Air Ministry were correct. " As a retired officer on retired pay you were only entitled to a gratuity under Art. 497 (a) £310," and they demanded the return of the over-payment of £434. In reply, on February 7th the defendant pointed out that they had made a mistake, and that he was " not a retired officer on retired pay." The plaintiffs inquired of the Admiralty whether that statement was correct, and were informed by a letter dated February 17th, 1921, that the defendant " resigned his commission as Engineer, R.N., on May 15th, 1900. He was appointed Engineer on the Emergency List on February 4, 1913." Thereupon the plaintiffs, attaching no importance to the statement that the defendant had been put on the Emergency List and overlooking the provisions of Order 263, wrote to the Air Ministry on February 21st, 1921, insisting that their payment of £744 was in order. On March 21st the Air Ministry wrote to the plaintiffs, " As the above-named officer received a bonus of 25 per cent. of his pay whilst in the R.N.A.S. in lieu of counting the time served towards pension, gratuity is admissible under Art. 497 (a) of the Royal

Warrant only." The plaintiffs replied that they ought to have been informed of the fact that the defendant had been at one time in receipt of a bonus if that fact was material, and under the circumstances they protested against the disallowance. In answer, the Air Ministry pointed out that it was clearly laid down in Order 263 of 1919 that officers on the Emergency List of the Royal Navy were only entitled to gratuity at the rate of 31 days' pay for each year's service, and insisted that the disallowance must stand. This was the first time that Order 263 had been referred to in the correspondence, and the defendant stated in evidence that he had at that time never seen the Order, and knew nothing of its provisions. The plaintiffs then wrote to the defendant on April 18th demanding repayment of the £434 disallowed. In the meantime, the defendant, who had heard nothing from the plaintiffs since his letter of February 7th, in which he had pointed out that the disallowance was founded upon a mistake, assumed that the matter was concluded, sold his War Savings Certificates and invested a substantial sum in a company which has since gone into liquidation. The defendant being unable to refund the amount of the disallowance, this action was brought to recover that sum as money paid under a mistake of fact. After action brought, it was pointed out in a letter dated May 15th, 1922, from the Admiralty to the Air Ministry that had the defendant been treated as being on the Emergency List after his transfer to the Air Force he would have received a bonus during the whole period, whereas he was in fact treated as a "temporary officer" without bonus; and the Air Ministry having regard to that fact agreed to allow the defendant a gratuity for the period since April 1st, 1918, at the rate for temporary officers provided by Art. 497 (b). The disallowance was thereupon reduced from £434 to £298, and the plaintiffs reduced their claim accordingly.

The action was tried before Lush, J., without a jury. His Lordship held that the plaintiffs could not recover. He held that even if they had made a mistake of fact, they could not recover, because they had failed to show that it was against conscience for the defendant to retain the money. The plaintiffs were in just as good a position as the defendant to appreciate the meaning of the various Orders, and he had a right to rely on their assurance that he was entitled to the money that they paid him; and as he had, on the faith of that assurance, altered his position by spending the money, they were precluded from maintaining the action on the principle of Skyring *v.* Greenwood (4 B. & C. 281).

The plaintiffs appealed.

Bankes, L.J., having stated the facts and referred to the correspondence above set out, came to the conclusion that

the plaintiffs in paying the money to the defendant did not act under any mistake of fact at all. Even if the clerk in the plaintiffs' office who drew up the order for the payment of the gratuity did not know that the defendant was on the Emergency List, that was not a mistake which caused the payment to be made, for it appeared clear from the correspondence that the plaintiffs did not until long after that payment appreciate the materiality of an officer being on that list. The provisions of Order 263 of 1919 appeared to have been altogether overlooked. The plaintiffs' mistake, if any, was one of law; it resulted from a failure to apply what was now said to be the true construction of the Orders relating to gratuities to the defendant's case. The plaintiffs consequently could not recover.

His Lordship added :—" But it was also contended on behalf of the plaintiffs that it was inequitable for the defendant to retain the money. It was said that he knew all about his position, and that he received the money knowing that it was largely in excess of what he was entitled to. All I can say is, if he did know it he knew more than Messrs. Holt knew, or than the Admiralty or the Air Ministry knew. Indeed I am not certain myself that, if I had to apply these Orders and fix the defendant's gratuity, I could even now say with certainty what was the exact amount that he was entitled to, having regard to the fact that after his appointment to the Air Force the authorities did not pay him the 25 per cent. bonus on his pay, and consequently did not in fact treat him as being on the Emergency List. I am satisfied that the defendant knew no more what his position was than any of the other persons concerned in the case. He was misled by the conduct of the plaintiffs into the belief that he might retain the money. I need not go into the authorities, but the judgment of Bayley, J., in Skyring *v.* Greenwood (4 B. & C. 281), to which we have been referred, is, I think, directly applicable to the present defendant's case, for it appears that for a considerable time he was left under the impression that, although there had been at one time a doubt about his title to the money, that doubt had been removed, and in consequence he parted with his War Savings Certificates. Having done that, it seems to me that he altered his position for the worse, and consequently the plaintiffs are estopped from alleging that the payment was made under a mistake of fact. In my opinion the appeal must be dismissed."

Warrington, L.J.:—" I am of the same opinion. This action was brought to recover a sum of money alleged to have been paid to the defendant under a mistake of fact. The onus of proving that there was such a mistake lies upon the plaintiffs, and, further, their claim may be defeated if the defendant can show that through their conduct he was led to put himself into such a

position that it would be inequitable now to require him to repay the money. The first question then is: Have the plaintiffs established that this money was paid under a mistake of fact? In my opinion they have not. It seems to me that when the position of this officer and the various and conflicting Orders, which might or might not be applicable to his case, are considered, the mistake (if there was any mistake at all, as to which I am not satisfied) was not a mistake of fact, but arose from a misapplication or misconstruction of the Orders having regard to the special circumstances of the case. That the defendant's case was a special one appears from a letter from the Admiralty to the Air Ministry, dated May 15th, 1922, in which they say that he should be treated as being upon the Emergency List for part of his service and as an officer holding a temporary commission for the rest of his service, and upon the receipt of which letter the Air Ministry agreed to reduce the amount of the disallowance. How in the face of that admission that the fact of the defendant having been on the Emergency List was left out of consideration it can be said that his having been on the list gave rise to a mistake of fact inducing the payment of the gratuity I cannot understand. It seems to me that on the facts of this case there was no mistake of fact at all. It was a mistake, if there was one, arising from the doubt whether in the particular circumstances of the case the officer was to be treated as entitled under Art. 497 (a), or 497 (b) of the Royal Warrant, or Order 263 of 1919. But assume that the payment was made under a mistake of fact. The question then arises whether the conduct of the plaintiffs was such as to render it inequitable to give effect to the relief which they claim. In my opinion it was. In a letter of February 2nd, 1921, the plaintiffs demanded the repayment of the difference between the £744 paid to the defendant and the £310 to which he was entitled, basing their claim on the fact that he was a retired officer on retired pay and came within Art. 497 (a). On February 7th he replied that that claim was mistaken as he was not a retired officer. From that date until April 18th he heard no more about the matter, and from that fact he was, in my opinion, entitled to conclude that his reply was regarded as satisfactory, and that he was at liberty to deal with the money as he pleased. The result was that he availed himself of that liberty and spent the whole or a large part of the gratuity which had been paid him, and he is not now in a position to repay it. The plaintiffs are in my opinion estopped from asking that he should do so. On these grounds, first, that the plaintiffs have failed to establish that the money was paid under a mistake of fact, and, secondly, that, if it was, they are estopped from setting it up, I think that the appeal ought to be dismissed."

Scrutton, L.J. :—" This is a troublesome instance of a particularly troublesome class of action. It is an action for money had and received to the plaintiffs' use, and is based upon the ground that the payment was made under a mistake of fact. Now ever since the time when that great judge, Lord Mansfield, with no doubt a praiseworthy desire to free the Court from the fetters of legal rules and enable them to do what they thought to be right in each case, obscured, in my respectful view, the nature of the action for money had and received, by saying in Sadler *v.* Evans (4 Burr., at p. 1986): 'It is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. The defence is any equity that will rebut the action,' the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought. I do not propose to repeat the very pungent criticisms which Lord Sumner has made upon that now discarded doctrine of Lord Mansfield in Baylis *v.* Bishop of London ([1913] 1 Ch. 127) or in Sinclair *v.* Brougham ([1914] A.C. 398), but I respectfully entirely agree with what he says in the former case : ' To ask what course would be *ex aequo et bono* to both sides never was a very precise guide, and as a working rule it has long since been buried in Standish *v.* Ross and Kelly *v.* Solari. Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled " justice as between man and man " '; and with the similar passage in Sinclair *v.* Brougham ([1914] A.C., at p. 456) ' There is now no ground left for suggesting as a recognizable " equity " the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer.' I also agree with Lord Sumner's view that it is very hard to reduce to one common formula the conditions under which the law will imply a promise to repay money received to the plaintiffs' use. I do not think the time has come in this case to do it. There is something to be said for the view that payment under a mistake of fact is not payment at all, and is therefore capable of rectification in cases in which the defendant receives the money under a mistake of fact or has done something to contribute to the plaintiffs' mistake of fact, but that the position is otherwise when the defendant is under no mistake of fact and has done nothing to contribute to the plaintiffs' mistake, and does not appreciate that the payer is making the payment under a mistake of fact. However, the time has not yet come to attempt to settle conclusively what is the one formula which will embrace all the cases in which the common law would have allowed an action for money had and received in consequence of a payment under a mistake of fact.

" I personally propose to decide this case on one main ground, although I have also a view that it would be sufficient to decide it on another. I think this is a simple case of estoppel. The plaintiffs represented to the defendant that he was entitled to a certain sum of money and paid it, and after a lapse of time sufficient to enable any mistake to be rectified he acted upon that representation and spent the money. That is a case to which the ordinary rule of estoppel applies. In Skyring *v.* Greenwood (4 B. & C. at p. 290), where the facts were very similar, Bayley, J., said :—' It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such.' That view was acted upon by the Court of Appeal in the later case of Deutsche Bank *v.* Beriro (1 Com. Cas. 255). There also money was paid by the plaintiffs under a mistake of fact, and the person to whom it was paid acted upon that payment and paid it over to another. It was held that the plaintiffs were estopped from recovering it back. In the present case, the payment was made in September, 1919, and it was not till February, 1921, that there was any suggestion of a mistake having been made, and even then the suggestion was based on an entirely wrong ground. That was corrected by the defendant, and the matter was allowed to go on for another three months before the claim was made on the lines now put forward. That appears to me amply sufficient to bring the case within the principle that I have stated.

" But I desire further to say that I am not at all satisfied that there was in this case any mistake of fact in the sense in which that term is used in the cases, such, for instance, as Kelly *v.* Solari (9 M. & W. at p. 58), where Parke, B., thus expresses the principle :— ' I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back.' It is said here that the specific fact which was supposed to be true, the knowledge of the untruth of which would have prevented the plaintiffs from paying the money, was that the defendant was not on the Emergency List. But if they had known that he was on that list that would in my opinion have made no difference, for I am satisfied that at that time no one appreciated what the effect was of an officer being on that list. An officer on the Emergency List was a very rare person. We have been furnished with a very long list, containing hundreds

of names, of officers transferred from the Navy to the Air Force. I have looked through the whole of the names, under the letters E to M inclusive, and the only name I can find indicated as being on the Emergency List is that of the defendant. If, therefore, those letters fairly represent the rest of the alphabet the defendant's case was a most exceptional one. I come therefore to the conclusion that the mistake of the plaintiffs, which was partly one of fact and partly of construction, was in no respect connected with the payment of the money. For these reasons I agree that the appeal must be dismissed."

Appeal dismissed.

*Note.*—There was no real mistake of fact in this case. Fact and law may both be involved in a question of status, *e. g.*, whether a man is a British or an American subject, but this was not an analogous case. It depended solely on the construction of a mass of complicated official instructions, the defendant's record of service not being in dispute, and the question being merely which of such instructions applied to his case and with what result.

The candid admission of Scrutton, L.J., as to the impossibility of defining the nature and operation of the action for money had and received, again draws attention to the unfortunate position of this important branch of the law.

The present case, however, points out a basis on which, in suitable circumstances, the matter may be dealt with without embarking on the doubts and subtleties of money had and received.

Holt and Co. *v.* Markham differed in some respects from Skyring *v.* Greenwood, the leading case on which it was decided.

According to the report, £744 was paid on September 18th, 1919, to Col. Markham, £496 in cash and £248 in War Certificates. Holts were the army agents for the Air Force, in which Col. Markham served, but there is no mention of the transaction having been shown in any pass-book or statement of account, possibly because Col. Markham was demobilized in August, 1919, and the payment was the result of his application for a gratuity on August 25th, 1919.

On February 2nd, 1921, Holt and Co. informed the defendant that there was a mistake and demanded £434 back. He, by letter of February 7th, disputed the mistake. Holt and Co. entered into correspondence with the authorities, but took no notice of Col. Markham's letter. On April 18th, 1921, Holt and Co. again wrote to him demanding £434. Between February 2nd and April 18th, 1921, Col. Markham, not having heard from Holt and Co., concluded that his explanation on February 7th was accepted as satisfactory, sold his War Certificates, and

invested a substantial sum in a company which went into liquidation. After action brought, the Admiralty accorded Col. Markham a gratuity which reduced the disallowance to £298, and the plaintiffs reduced their claim to this amount—being practically what defendant had spent and lost between February 7th and April 18th, 1921.

On these facts, and apart from any question of mistake, the Court of Appeal held that Holt and Co., by their conduct, and the action that Col. Markham had thereby been led to take, were estopped from claiming the money back.

The not answering a letter making certain statements or putting forward the writer's views of the situation, if such letter be on business matters, and such as an ordinary business man would not leave unanswered, may amount to admission or estoppel; and the Court of Appeal regarded Holt and Co.'s silence for two months after receipt of the defendant's letter of February 7th as conduct neutralizing the first demand for repayment, leading him to alter his position by spending the money and so estopping them from claiming it back.

This is basing the matter, as Scrutton, L.J., says, not on the disputed doctrine of money had and received, whether it is *ex aequo et bono* or "justice between man and man," that the money should be recovered or not, but on a pure point of estoppel, on the lines of Skyring *v.* Greenwood.

That case deals more with statement than with conduct or silence, but the joint result of the two cases seems to be to give effect to estoppel where justified on any of these grounds.

Part of the judgment of Bayley, J., in Skyring *v.* Greenwood is cited above, but it may be well to append part of the judgment of Abbott, C.J., in the same case, which was quoted in argument in Holt and Co. *v.* Markham, and is usually regarded as the real ground of the decision :—

"It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man if, after having had credit given him in account for certain sums and having been allowed to draw on his agent on the faith that these sums belonged to him, he may be called upon to pay them back."

[IN THE COURT OF APPEAL.]

## SWISS BANK CORPORATION *v.* BÖHMISCHE INDUSTRIAL BANK.

Reported. [1923] 1 K.B. 673. Journal, Vol. XLIV, 446.

*Garnishee Order—Foreign Corporation—Question of Double Liability.*

On June 9th, 1922, the Swiss Bank Corporation issued a writ against the Böhmische Industrial Bank claiming £54,884 16s. 6d., the balance of an account appearing on April 30th, 1922, in respect of money lent to the defendants and money paid by the plaintiffs for and at the request of the defendants and for interest and commission thereon. The defendants were a foreign corporation carrying on business in Prague in the Republic of Czecho-Slovakia.

Judgment for £29,422 16s. 10d. was entered for the plaintiffs and on August 28th a garnishee order *nisi* was made against the National Provincial and Union Bank of England attaching all debts owing or accruing due from the garnishees to the judgment debtors. On September 5th an order in similar terms was made against the London Merchant Bank. The last-named garnishees opposed the order on the grounds that the Böhmische Industrial Bank was a foreign corporation which did not carry on business within the jurisdiction of the Court and that, should the garnishees be ordered to pay to the judgment creditors the amount due from them to the judgment debtors, it would still leave them liable to an action to recover the same debt brought in a competent Court in a foreign place.

The Divisional Court refused to make absolute the garnishee order on the ground that the decision of the Court of Appeal in Martin *v.* Nadel ([1906] 2 K.B., 26) covered the facts of the case.

The plaintiffs appealed, and the Court allowed the appeal.

Bankes, L.J.: -"If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second

time; but if the debt is situate, that is, properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called upon to pay it over again in the foreign country. There is no doubt as to the effect of payment made under a garnishee order here. It is clearly a discharge *pro tanto* of the debt. That was declared by sec. 65 of the Common Law Procedure Act, 1854, which has been reproduced in Order XLV., r. 7, of the Rules of the Supreme Court. That rule provides that 'Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the debtor liable, under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed.'

"Now when a debt payable in this country is discharged by a Court of competent jurisdiction in this country, what is the result? It is clearly expressed by Bovill, C.J., in Ellis *v.* M'Henry (L.R., 6 C.P., 228, 324): 'There is no doubt,' said the Chief Justice, 'that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries.' In my opinion, the debt due from the garnishee to the judgment debtor was a liability arising in this country, which therefore according to the law as stated by Bovill, C.J., may be discharged by the laws of this country. I need say no more on the matter, but for Martin *v.* Nadel ([1906] 2 K.B., 26), which was relied on by the Divisional Court and strongly relied on by counsel for the respondents. There is a vital distinction between the facts of that case and the facts of the present case. In that case, a judgment debtor had paid into his bank in Berlin a certain sum of money. The garnishees in that case were the London branch of that bank. They had entered into a recognizance for the same amount. The amount found due on the recognizance was less than the amount paid into the Berlin office by the judgment debtor, so that when the London branch paid this lesser sum there remained the balance due in Berlin from the Berlin office to the judgment debtor. That was a debt situate in Berlin, being properly recoverable in Berlin. That was the debt sought to be garnisheed. Here the debt sought to be garnisheed was a debt situate in England being properly recoverable in England. In this case, the debt can be properly discharged in England. In Martin *v.* Nadel ([1906] 2 K.B., 26), the debt could be properly discharged only in Berlin.

. . . In my opinion, Martin *v.* Nadel ([1906] 2 K.B., 26) does not support the decision of the Divisional Court or the argument for the respondents. The appeal must be allowed and the garnishee order must be made absolute."

Scrutton, L.J., and Atkin, L.J., concurred.

Appeal allowed and garnishee order made absolute.

[IN THE COURT OF APPEAL.]

## TOURNIER *v.* NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND, LTD.

Reported. [1924] 1 K.B. 461. Journal, Vol. XLV, p. 88.

*Banker's Duty not to Disclose Customer's Affairs—Limits of that Duty.*

THIS was an appeal from the judgment of Avory, J., in favour of the bank, reported in the Times, November 10th and 13th, 1923.

The facts were summarised by Bankes, L.J., in his judgment as follows :—

JUDGMENT.

The action was founded on statements alleged to have been made by the acting manager of a branch of the defendant bank. The plaintiff complained that the statements were slanderous, and, further, that they constituted a breach of the duty owed by the bank to him. The plaintiff was a customer of the Finsbury Pavement branch of the defendant bank. In April, 1922, his account was overdrawn to a small amount, and on April 8th the plaintiff signed a document agreeing to pay off the debt by weekly instalments of £1. At the time when this document was signed plaintiff was about to enter the employment of a firm of Kenyon and Co., and on the document containing the agreement the plaintiff wrote their name and address. The plaintiff did not pay the weekly instalments as agreed. In July the acting manager of the branch, by name Fennell, got into telephone communication with Kenyon and Co. to ascertain the plaintiff's private address. The inquiry led to further conversation with two directors of the company, one Wells and the other Kenyon. The plaintiff's complaint in the action was that in the course of that conversation on the telephone Fennell had told Kenyon that his (the plaintiff's) account was overdrawn, that various promises made by him to give the matter his attention had not been fulfilled, that cheques which passed through his account were for betting men, and that the bank thought he was betting heavily. To Wells, Fennell was alleged to have said that he (Fennell) was afraid that the plaintiff was engaged with bookmakers, as the bank had been able to trace

a cheque or cheques passing from the plaintiff's account to bookmakers.

The plaintiff stated that as a matter of fact the cheque to the bookmaker was for some goods purchased and not in respect of any betting transaction.

The account given by Fennell, the defendant bank's branch manager, of the telephonic conversation differed somewhat from the plaintiff's.

His account of the conversation was that he rang up Messrs. Kenyon to ascertain what the plaintiff's private address was, and whether he was working on salary or commission. He was asked why he made the inquiry, and he then explained that the plaintiff was indebted to the bank in a small amount, and that he had not replied to letters. He then went on to say that the plaintiff must be getting money from some source or other, that he (Fennell) had seen cheques coming through the bank payable to the plaintiff, and that he had made it his business to find out where one cheque had gone to, and that he had been informed that it had gone to the credit of a bookmaker's account, and that if that was the case he thought that the plaintiff ought to have paid off some of his debt to the bank.

The Lord Justice considered that though the two accounts varied in form, they were not so inconsistent in substance as to make it misdirection that the judge at the trial had not left to the jury the question whether the words as alleged had been proved.

With regard to the main point, the claim for damages for breach of duty by disclosing the customer's affairs, the Lord Justice said as follows :—

"The case with regard to the claim for damages for breach of duty raises a very important question, and one on which the learned Judge did not, in my opinion, sufficiently direct the jury. The case for the plaintiff, as alleged in the statement of claim, was that the bank was absolutely pledged to secrecy in regard to the plaintiff's account and business, and all matters incidental thereto, and that it was an implied term of the contract between the plaintiff and the bank that they would not disclose to anyone any of the plaintiff's business with the bank or matters arising therefrom, or the nature or state of his account, or any transactions relating thereto. The learned Judge very properly, in my opinion, ruled against the existence of any such absolute contract. The matter might have rested there. It did not do so, however, because, in his summing up, the learned Judge did give a direction to the jury on the law on the point, and asked them a question with regard to it. The question was this :—'Was the communication with regard to the plaintiff's account at the bank

made on reasonable and proper occasion?' and his direction on this point was as follows :—' Fifthly, I shall have to ask, in view of the other claim for breach of contract, whether the communication of the state of the plaintiff's account at the bank, which was made to his employers, was, under the circumstances, made on a reasonable and proper occasion—that is to say, whether there was a reasonable justification for his making that communication? I shall hold, as a matter of law, that there is no such absolute contract as counsel for the plaintiff has contended for between a banker and his customer. He has contended that there is an absolute contract that the banker shall not, under any circumstances, disclose the state of a customer's account to another person. I hold, as a matter of law, that there is no such absolute contract. But if the banker has made that disclosure justifiably—that is to say, if, under the circumstances of the particular case, it was reasonable and proper that he should make the communication—then there is no breach of contract on his part.'

" With all respect to the learned Judge, this is not a sufficient explanation of what is a difficult and hitherto only very partially investigated branch of the law. The Judge no doubt took the form of the question from the case of Hardy *v.* Veasey (3 Ex., 107), in which the Judges raised, without deciding them, a number of questions in relation to the duty of banker towards customer not to disclose his affairs, and among others the question whether the duty was a legal or only a moral one, and, if legal, whether it arose out of contract or out of tort.

" At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification and to indicate its limits. For this purpose the case of Hardy *v.* Veasey is of no assistance. The plaintiff, in his amended declaration in that case, set out a promise on the part of the bank not to disclose the state of his banking account except 'on a reasonable and proper occasion.' To this the defendants pleaded a denial and leave and licence. The disclosure complained of was made to a money-lender, to whom the defendants' manager applied with a view of obtaining assistance for the plaintiff. The learned Judge who tried the action stated that the question for the jury would be 'whether the communication to the moneylender of the state of the plaintiff's account was an officious and unjustifiable one,' and he added :—'If it was made with reasonable hope or an honest intention of getting assistance for the plaintiff I should doubt whether the action is maintainable.' The jury found for the defendants. The discussion in the Exchequer Chamber took place on an

application for a new trial, and no decision was given except that there had been no misdirection and no wrong verdict. The plaintiff, by his pleading, had confined his complaint to a disclosure on some occasion other than a reasonable and proper occasion, and the Chief Baron, in his judgment, is only referring to the plaintiff's complaint when he uses those words.

"The question was never raised whether it was a proper way of ascertaining what the defendants' duty was to ask a question of the jury in that form. Had that question been discussed, I cannot think that the Court would have approved of such a question, partly because it is leaving to the jury a question which is primarily a question for the Judge, and partly because it leaves the jury entirely without instruction as to what the circumstances are which they are entitled to take into consideration in arriving at a conclusion as to what is reasonable and what is proper.

"In my opinion, it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle, I think that the qualifications can be classified under four heads :—(*a*) Where disclosure is under compulsion by law; (*b*) where there is a duty to the public to disclose; (*c*) where the interests of the bank require disclosure; (*d*) where the disclosure is made by the express or implied consent of the customer. An instance of the first class is the duty to obey an order under the Bankers Books Evidence Act. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in Weld Blundell *v.* Stephens (36 The Times L.R., 640; [1920] A.C., at p. 965), where he speaks of cases where a higher duty than the private duty is involved, as where danger to the State or public duty may supersede the duty of the agent to his principal. A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft, stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorises a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the account remains confidential unless released in circumstances bringing the case within one of the classes of qualification I have already referred to. Again, the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question, but one vital to this case, is whether the confidence extends to information in reference to

the customer and his affairs derived not from the customer's account, but from other sources, as, for instance, from the account of another customer of the customer's bank.

" It is very necessary to speak with caution on this question, on which there is no authority. I desire, therefore, to confine my observations to the facts of this particular case. The information which the branch manager is said to have disclosed, and which disclosure is said to have constituted a breach of duty, came to the bank in the following manner. A cheque was drawn by a customer of the bank on their Moorgate Street branch in favour of the plaintiff. The cheque was paid into the account of a customer at the London City and Midland Bank. When the cheque came back to the Moorgate Street branch Mr. Fennell's attention was called to the fact that the plaintiff had not paid the cheque into his account, and Mr. Fennell then made inquiries of the London City and Midland Bank, the reply to which he is said to have committed a breach of his duty in disclosing.

" The privilege of non-disclosure to which a client or a customer is entitled may vary according to the exact nature of the relationship between the client or the customer and the person on whom the duty rests. It need not be the same in the case of the counsel, the solicitor, the doctor, and the banker, though the underlying principle may be the same. The case of the banker and his customer appears to me to be one in which the confidential relationship between the parties is very marked. The credit of the customer depends very largely upon the strict observance of that confidence. I cannot think that the duty of non-disclosure is confined to information derived from the customer himself or from his account. To take a simple illustration. A police officer goes to a banker to make an inquiry about a customer of the bank. He goes to the bank because he knows that the person about whom he wants information is a customer of the bank. The police officer is asked why he wants the information. He replies because the customer is charged with a series of frauds. Is the banker entitled to publish that information? Surely not. He acquired the information in his character of banker. So in the present case. Mr. Fennell was put upon inquiry by a cheque drawn in the plaintiff's favour on a customer's account. He acquired the information which he is said to have divulged in his character as the plaintiff's banker. I use the expression 'in the character of banker,' because I find that expression used by Baron Gurney in the case of Davies *v.* Waters (9 M. and W., p. 608), in which the question was raised whether a solicitor had acquired certain information as attorney for a client or as his trustee. At page 613 Baron Gurney says :—

" 'But the objection here goes further; for just an hour before the trial, being possessed of the deed, and possessed of it in the

character of trustee, he takes it to the consultation, and there, in the character of attorney for the defendant, and for the express purpose of informing the minds of the counsel for the defendant, he reads the deed, and by that means acquires his knowledge of its contents. Can it be doubted that this is a knowledge acquired in the character of professional adviser of the party? If so, it is fit and proper that knowledge so acquired should be held sacred.'

"Baron Rolfe did not agree with this view of the facts, but I cite the passage because it introduces what is, I think, a convenient indication of the limits of professional or commercial privilege in relation to non-disclosure. In Taylor *v.* Blacklow (3 Bing., N.C., at p. 249) Mr. Justice Vaughan, in speaking of a violation by a solicitor of the professional privilege, speaks of it as a breach of a great moral duty, and he adds that 'the law is never better employed than in enforcing the observance of moral duties.' In the present case I think that the information obtained by Mr. Fennell as the result of his inquiry to the London City and Midland Bank was covered by the privileges of the customer, and that the bank are liable for any disclosure of that information which may have caused damage to the plaintiff, unless the bank can bring the disclosure of the information so derived under one of the classified qualifications I have already referred to.

"It follows from what I have said that in my opinion a direction to the jury in a case such as the present must inform the jury of the nature and limits and qualifications of the duty of the bank as a matter of law, leaving to them only questions for the purpose of ascertaining their view whether the communication complained of was or was not made, and whether it did or did not come within any of the protected occasions to which I have drawn attention. For these reasons I consider that the appeal must be allowed with costs, the judgment entered for the defendants set aside, and a new trial ordered. The costs of the first trial to abide the event of the new trial."

Lord Justice Scrutton and Lord Justice Atkin delivered judgments to the same effect.

Appeal allowed. New trial ordered.

*Note.*—As Bankes, L.J., says, the question whether the banker's obligation of secrecy was a legal or only a moral one has hitherto been somewhat unsettled.

It is now established as a legal one, arising out of the relation of banker and customer, and so giving a right to nominal damages for any breach thereof, to substantial damages should the customer be appreciably injured thereby.

Its observance may be regarded as part of the contract between banker and customer, though not enumerated among the incidents

of that contract by Atkin, L.J., in Joachimson *v.* Swiss Bank Corporation, [1921] 3 K.B., at p. 127, *ante*, p. 233.

The basis of the duty of non-disclosure embodied in the implied contract is the confidential relationship between the parties, which in the banker's case is stated to be of a very high nature and degree, even as compared with the analogous cases of counsel, solicitor, or doctor, owing to the fact that the credit and commercial existence of the customer depend largely on the strict observance of that confidence by the banker.

The duty of non-disclosure, according to Bankes, L.J., does not terminate with the closing of the account. It applies whether the account be in credit or overdrawn.

Nor is it limited to information derived from the customer himself or from his account, as is shown by the suggested instance of the statenent made by the police and by the facts of the present case. The duty extends to all information acquired by the banker in his capacity as such.

Indeed, it seems arguable that the rule might be carried further. A banker, in his private or social capacity, might learn facts prejudicial to his customer's financial position.

He might fairly take these into consideration in his bank's dealings with the customer; but the relationship enures and ought to preclude any spontaneous outside publication of the knowledge so acquired.

The duty is not confined to statements purely relative to the account. The banker may not disclose matters touching his customer's credit or otherwise affecting him which have come to his knowledge by virtue of his being that customer's banker.

In short, subject to the exceptions laid down by Bankes, L.J., the banker's best and wisest course is absolute silence as to his customer and his concerns, and the rule applies to all engaged in the banking profession, directors, managers, branch managers, and subordinates alike. Unauthorised disclosure by anyone having ostensible authority may make the bank liable.

That exceptions should exist is inevitable and obvious. The plaintiff's contention that the rule of secrecy was absolute, admitting of no relaxation in any circumstances, has no sanction from prior authorities, and is clearly untenable.

The classification by Bankes, L.J., of the qualifications of the rule under four heads affords at least a good guide as to the conditions under which a banker may, or sometimes must, depart from the accepted rule of secrecy.

That classification is as follows :—

*Qualification* 1.—Where disclosure is under compulsion of law

Obedience to an order under the Bankers Books Evidence Act is the leading instance of this.

Service of a garnishee order *nisi* involves a modified and legitimate amount of disclosure.

This exception of "compulsion by law" must be confined to the regular exercise, by the proper officer, of actual legal power of compelling disclosure.

It is not every demand emanating from a Government Department or its representatives which fulfils the above definition.

Requisitions have been addressed to bankers by the Inland Revenue claiming information as to customers' accounts and affairs, presumably with a view to checking the income tax returns of such customers.

It would be interesting to know on what statutory authority such demands are based. Possibly on a very dubious interpretation of sec. 103 of the Income Tax Act, 1918.

The provisions making bankers responsible for tax on foreign dividends or coupons collected by them contain a saving clause, "Nothing in these rules shall impose on any banker or person acting as a banker the obligation to disclose any particulars relating to the affairs of any person on whose behalf he may be acting." Schedule C. rule 8.

This is a privilege the banker should strenuously uphold, especially as it seems to negative any claim under sec. 103.

*Qualification* 2.—Where there is a duty to the public to disclose.

Bankes, L.J., says many instances of this class might be given, but does not specify any, leaving the question on the general basis of a higher duty than the private one, as where danger to the state or the claims of citizenship may supersede the personal obligation.

Opinions might well differ as to whether a particular state of facts involved either of these qualifications, *e.g.* funds accumulated in the banker's hands for some very extreme political purpose or propaganda subversive of social order. But it would be inadvisable for a banker to exercise his private judgment in such matters at the expense of his customer.

*Qualification* 3.—When the interests of the bank require disclosure.

The endorsement of a writ with particulars of claim for an overdraft against the customer, the disclosure of the state of the account when suing a guarantor, notice of a mortgage or charge created by the customer, these are instances of this class of qualification. So, again, as to answering relevant questions by a proposing guarantor, but not volunteering information. The interests of the bank clearly require that it shall not jeopardize its own security. Outside information, suggesting any particular steps advisable with regard to the customer, can generally be utilized without publication.

*Qualification* 4.—Where the disclosure is made by the express or implied consent of the customer.

Under this head come banker's references, and it is noticeable that, in accord with the earlier authorities, Bankes, L.J., holds or implies that, even as between bankers, an answer should only be given at the request and with the knowledge of the disclosing bank's customer.

[IN THE KING'S BENCH DIVISION.]

## CAPE ASBESTOS COMPANY LIMITED *v.* LLOYDS BANK LIMITED.

Reported. [1921] W.N. 274.

*Revocable Credit—No Legal Duty on Bank to give Notice of Revocation—Documents not in accordance with Terms of Credit.*

THE facts sufficiently appear from the Judgment.

JUDGMENT.

Mr. Justice Bailhache : This is an action by the Cape Asbestos Company, Limited, against Lloyds Bank Limited, and it arises upon a sale by the Asbestos Company to some people in Warsaw, I think, of some 30 tons of asbestos millboards " Pluto " at a price of £60 sterling per ton f.o.b. London. When that sale was made the Banque de l'Est, Warsaw, instructed Lloyds Bank to open a credit in favour of the sellers. Lloyds Bank on June 14th intimated the fact that they had opened that credit to the plaintiffs in this case. The letter was : " We beg to inform you that we have received advice by telegraph from Banque de l'Est, Warsaw, of the issue of a credit in your favour for £1620, say sixteen hundred and twenty pounds, to be availed of meanwhile by your draft on us at sight accompanied by invoice and bill of lading (in complete set) to order of Lloyds Bank Ltd. covering shipment of 30 tons asbestos sheets consigned to ' the buyers at Warsaw.' " It added these words at the end : " This is merely an advice of the opening of the above-mentioned credit and is not a confirmation of the same."

The effect of that letter is that the credit is a revocable credit and can be revoked at the will of the Warsaw Bank acting on the instructions of the buyers, and is available to answer the drafts on Lloyds Bank accompanied by the necessary documents, so long as the credit remains open. On August 4th the credit was withdrawn. In the meantime the plaintiffs had sent forward a portion of these asbestos millboards and had deposited certain documents with Lloyds Bank and had received in exchange for those documents part of the sum for which the credit was opened. On October 2nd they sent to Lloyds Bank the documents

relating to the balance of the 30 tons. Those documents included an invoice and the bill of lading. The invoice was for more than the balance of the credit, and the bill of lading, instead of being made out to Lloyds Bank, was made out in favour of the buyers of the asbestos. No notice had been given by Lloyds Bank to the plaintiffs of the revocation of the credit on August 4th, and the plaintiffs were under the impression that that credit still remained.

The goods went forward. By some means or other the buyers, without having the necessary bill of lading, or what we should consider the necessary bill of lading, managed to obtain possession of the goods. They have not paid for them and the plaintiffs have lost their money. They now claim against Lloyds Bank the balance of the credit. They claimed in their action the full invoice price of the goods; but they had necessarily to abandon the difference between the full invoice price of the goods and the balance of the credit.

The crucial question in this case (there are other questions), the question that goes to the root of the case, is whether there was any legal obligation, any legal duty, on the part of Lloyds Bank to inform the plaintiffs, when that credit was withdrawn, of the fact that it was withdrawn. It is much to be regretted that they did not so inform the plaintiffs. The gentleman who was in charge of that department of Lloyds Bank has been called. He says that it is the practice of the bank to inform persons of the withdrawal of a revocable credit and that he would have done so in this case, but that, under the pressure of business, he forgot to do so. It is clear, therefore, that the bank departed from their usual practice and departed from it under the circumstances which I have just stated.

What I have to consider is not so much what is the practice of the bank in these cases, but whether there is any legal obligation on the part of the bank to give such a notice.

It is to be observed that the notice which was given by the bank on the opening of the credit is of the opening of a revocable credit and not of a confirmed credit. That tells the person in whose favour the credit is opened that he may find that the credit is revoked at any time. That being the representation which is made by the bank to the person in whose favour the credit is opened, the seller in this case, are the bank under any legal obligation to him to inform him when that credit is revoked?

I took a little time to consider this case because I did not feel quite sure about it, and I wanted to think it over. I have come to the conclusion that, however wise and however prudent, and however much in the interest of business, such a notice may be, there is no legal basis upon which I can found an obligation on the bank to give such a notice under such circumstances. It

seems to me that in a case like that, certainly the wise thing for the seller to do before making a shipment is to inquire of the bank who have given him notice that the credit is revocable, whether the credit has been withdrawn or not; but I should be very sorry if anything that I said here to-day led the banks to alter their practice, which is certainly a reasonable business practice. At the same time it does not seem to me to be based upon any legal obligation or duty. The witness called for the bank said that the bank regarded it as an act of courtesy which they always performed except in such a case as this when, unfortunately, it was forgotten. In my opinion that is the true view of the situation. It is an act of courtesy which it is very desirable should be performed, but not based upon any legal obligation or duty.

Of course, if that be right, that disposes of this case; but the bank take a further objection and make a further defence to the case. They say that, even apart from that, the documents which the sellers tendered to them when they asked for payment of the balance of the credit were not the documents which the credit called for; and in that the bank are quite right. First of all, the invoice asked for too much: secondly, the bill of lading instead of being made out to the order of Lloyds Bank is made out to the order of the buyers. In my judgment the bank, of course, would have been quite right, if they had taken that ground, in refusing to pay upon the ground that both those documents were out of order.

Then it is said in answer to that: "Oh, well, they may have been out of order; but we could have put ourselves in order." No doubt, so far as the invoice is concerned, they could have put themselves in order; but so far as the bill of lading is concerned I am very far from being convinced that they ever could have put themselves in order. The ship had sailed. No doubt on board there was a captain's copy of the bill of lading, and there was, no doubt, also a manifest which probably made the goods deliverable in accordance with the terms of the bill of lading. I do not see how the terms of the bill of lading could have been altered by the plaintiffs in this case, even though they had got the persons who issued the bill of lading to consent to the alteration. The persons who issued the bill of lading were the transporter company. It seems to me, therefore, that the plaintiffs cannot establish the proposition that they ever would have been under any circumstances in a position to demand from the bank payment of the amount of the credit in accordance with the terms of the credit.

In answer to the difficulty about the bill of lading the plaintiffs say: "Oh, but the second bill of lading was in exactly the same terms as the first bill of lading and the bank paid on the first

bill of lading without any complaint or criticism, and, having paid on the first bill of lading without criticism, they were bound to accept the second bill of lading which was in the same terms." They refer to the *Panoutsos* case as being an authority which supports that contention. I should not trouble to refer to the contention very much, except that, as I was a party to that (in fact I think I gave the first decision in the *Panoutsos* case), I should like to point out that the *Panoutsos* case is no authority for any such proposition at all. The *Panoutsos* case is authority for this proposition—that where an act has to be done by the buyer of goods, as, for instance, the opening of an established credit, and he either does not open a credit or does not open an established credit, and the seller goes on delivering with knowledge of the fact, the seller cannot suddenly stop and say: "I will deliver no more goods to you because you have not opened the credit, or the established credit, which you were bound to open." In such a case if he wishes to stop deliveries he must give notice to the buyer and give him an opportunity of putting himself right. That case is no authority for the proposition that where an act has to be done periodically, the fact that it had been done irregularly in the past justifies the buyer of the goods in assuming that those irregularities will be waived in the future. The *Panoutsos* case has only reference to an act which has to be done once and for all and not to an act which has to be done periodically.

The result of my judgment upon the question of the legal duty of the bank to give this notice is in favour of the bank. But a good deal was said about the question of damages. It was said that even if the bank had committed a breach of duty in failing to honour this credit they were not liable for the price of the goods. In my judgment that contention is entirely wrong. If the bank had in fact honoured this credit the plaintiffs would have found themselves with the amount of the credit in their pockets, and what happened to the goods would have been of no interest to them at all. What has happened is that, by reason of the failure to give notice, the goods have gone to Dantzig and possibly to Warsaw, that they have there passed out of the possession of the plaintiffs, that some unauthorised person has got hold of them, and that the goods have been lost. If the credit had been available and the same thing had happened, the goods would have been lost but would have been lost to the loss not of the plaintiffs but of the bank. It seems to me quite clear that if there was any duty on the part of the bank to give this notice, the damages to the plaintiffs are the amount of the balance of the credit which was opened at the request of the Warsaw Bank. I forget what the precise amount is; but I state that fact in case this action goes to the Court of

Appeal and my view as to the duty of the bank to give notice and also my view as to the impossibility of the plaintiffs ever putting themselves into the position to demand the balance of the credit are found to be wrong.

There will be judgment for the bank, with costs.

His Lordship subsequently said: "The truth of the matter is, that an unconfirmed credit is practically useless. If I was a seller of goods I would never accept an unconfirmed credit under any circumstances whatever."

*Note.*—Although this case negatives the existence of any legal duty on the part of the banker to give notice of the revocation of a credit to the party interested, bankers will no doubt, as a rule, give such notice, as it seems the right and reasonable thing to do.

The *Panoutsos* case, above referred to, will be found *ante*, p. 156.

[IN THE COURT OF APPEAL.]

## *In re* DUTTON MASSEY & CO. *Ex parte* DISTRICT BANK LIMITED

Reported. [1924] 2 Ch. 199. Journal, Vol. XLV, p. 357.

*Guarantee of Individual Partners to secure Advance to the Firm—Administration of Joint and Separate Estates.*

The firm of Dutton Massey & Co., which consisted of three partners, namely, Mr. Charles William May Massey, Mr. Richard Kendall and Mr. Walter Massey, carried on business at Norfolk House, Laurence Pountney Hill, in the City of London. Some time prior to the assignment presently mentioned, that is to say, on April 1st, 1921, two of the partners, Mr. Charles W. M. Massey and Mr. Kendall, had each separately deposited with the firm's bankers, the District Bank (formerly the Manchester and Liverpool District Banking Company, Limited), certain stocks, shares and debentures belonging to such partner as his own separate property for the purpose of securing the joint account of the firm and on the same day these two partners also deposited with the bank to secure the same account certain other securities which belonged to the two jointly, though not as partnership property. In addition to depositing those securities, those two same partners on April 18th, 1921, each gave his separate personal guarantee in writing to the bank to secure the firm's account up to a limit, in each case, of £15,000. Each guarantee stated that it was a primary security and in addition to and not to be prejudiced or affected by or to prejudice any collateral or other security held by the bank.

In November 1921 the firm executed a deed of assignment (to which the bank assented) of the property of the partnership upon trust for the benefit of the creditors of the partnership and in that deed it was provided that in the administration of the joint and separate estates of the debtors the rules, rights and equities prevailing in bankruptcy should be followed.

The bank in due course proved against the partnership estate for the debt due to them from the firm amounting to upwards of £69,000, but in addition to that the bank claimed to be entitled to prove against the separate estate of each of the two guaranteeing partners for £15,000, without valuing or bringing into account the securities which they held for the joint debt of the firm. This claim was resisted by the trustee of the deed of

assignment and accordingly, under sec. 23 of the Deed of Arrangement Acts 1914 the question in issue came on November 5th, 1923, before the court having jurisdiction in bankruptcy for determination.

P. O. Lawrence, J., held that the bank were entitled to prove against the separate estates of each of the two partners under their guarantees without bringing into account the value of the securities which had been pledged to them by those partners: and the learned judge so held, on the ground that the charge which the bank held on those securities was a charge in respect of the joint debt of the firm and was not a charge in respect of the debts of £15,000 due to them under the personal guarantees; in other words, on the ground that the bank was not a secured creditor within the definition of sec. 167 of the Bankruptcy Act 1914 which defines a secured creditor as "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

The trustee appealed from that decision and the Court of Appeal dismissed the appeal and affirmed the decision of P. O. Lawrence, J.

[IN THE COURT OF APPEAL.]

## GOLDMAN *v.* COX.

40 Times L.R. 744.

*Forged Cheques—Recovery by Drawer.*

This was an appeal by the defendant from the decision of Mr. Justice Rowlatt (reported in The Times of March 7th and in 40 Times L.R., 423).

The plaintiff in the action, Mr. Myer Goldman, of Barking Road, East Ham, was a Pole carrying on the business of a clothier. He could speak English, but he could not read it unless it was printed. To attend to his accounts he employed a clerk. In August, 1921, he engaged a man named Mayo, who had previously been a rate collector, at £3 10s. a week. This man would enter the sales and purchases in the books and make out cheques which the plaintiff would sign. In September, 1922, the plaintiff's business fell off, and, as he could not afford to pay Mayo's salary, he gave him notice. Mr. Goldman then went away for six weeks to Poland. When he returned he found that Mayo had been assisting in the business, voluntarily, and so re-engaged him at £2 a week.

The plaintiff bought considerable quantities of goods from a Mr. A. Cohen. Cheques to the value of £25 were paid weekly, on account, to Mr. Cohen. The plaintiff alleged that Mayo had forged the name of the payee by writing "S" before A. Cohen, and had also forged the endorsement. The clerk was prosecuted and was sentenced to imprisonment. The plaintiff now claimed the recovery of £700 from the defendant, George Cox, a publican, who had given Mayo cash for the cheques and had, in turn, obtained the money from the bank on presentation of the cheques, as money received to the use of the plaintiff. Altogether about thirty cheques were so cashed over a period of fifteen months. Some of them had been signed by the plaintiff in blank.

Mr. Justice Rowlatt held that as the cheques were, before signature, made out to a real creditor and not to a fictitious person, the plaintiff was entitled to recover.

The defendant appealed.

The Court dismissed the appeal without calling upon counsel for the respondent.

JUDGMENT.

Lord Justice Bankes said this was an unfortunate case for the defendant, but it was only one of the many instances of the risk run by tradesmen who cashed cheques for third parties. They would persist in doing it, and so long as they did it they would be held liable. No doubt the risk run was a very substantial one in the present case. There could be no doubt about the correctness of the learned Judge's decision as far as the law was concerned. The facts were that the plaintiff was induced by his manager to affix his signature to certain cheques in favour of existing customers, and not in favour of fictitious persons. These cheques had been signed by the plaintiff as drawn, and afterwards the manager forged them by making them payable to S. A. Cohen and not A. Cohen. He then took the cheques to the manager of the defendant's public-house, who gave cash for them. The plaintiff's case was that the endorsements were forged as well as the body of the cheque, and that although the defendant had no title to the cheques, he passed them on to his bankers and collected the cash for them. In support of that the plaintiff relied on Vinden *v.* Hughes (21 Times L.R., 324; [1905] 1 K.B., 795). He (the Lord Justice) thought that that case was exactly in point, and had been approved in the Court of Appeal. The only thing that was said on the other side was that this case was governed by Cocks *v.* Masterman (9 B. and C., 902), and the case which followed it of London and River Plate Bank *v.* Bank of Liverpool ([1896] 1 Q.B., 7); but in his (the Lord Justice's) opinion those two cases did not apply at all. They dealt only with a special class of facts, where a person had paid a bill in good faith and afterwards sought to recover the money so paid upon the ground of a mistake of fact. In fact, he was paying on a forged document. The Court there held that it was too late to recover the money so paid, because in the interval of time which had elapsed the position of the holder and other persons might have been altered. It was true that there was no exact proof as to the number of cheques dealt with in this case, but the learned Judge had thought it right to discount the plaintiff's claim by £200, and he (the Lord Justice) could see no reason for interfering with that. The result was that the appeal failed, and must be dismissed.

Lord Justice Scrutton and Lord Justice Atkin agreed.

*Note.*—This case is a useful addition to the somewhat complicated law as to fictitious payee. It also discourages attempts unduly to extend the scope of Cocks *v.* Masterman and the River Plate Bank case, while fully recognizing the soundness of those decisions.

[IN THE COURT OF APPEAL.]

## A. L. UNDERWOOD, LTD. *v.* THE BANK OF LIVERPOOL AND MARTINS LTD. SAME *v.* BARCLAYS BANK LTD.

Reported. [1924] 1 K.B. 775. 40 Times L.R. 302. Journal, Vol. XLV, p. 214.

*Director of One Man Company paying Company's Cheques into Private Account—Crediting as Cash—Negligence.*

THIS was an appeal by the banks from the judgment of Roche, J., in favour of the plaintiffs.

The Court dismissed the appeals.

In his judgment in the first of these cases, Bankes, L.J., stated the facts as follows :

" The real issue between the parties is as to the true inferences to be drawn from the facts, and the fate of this appeal depends upon what the true inferences are. The man Underwood, whose dealings with a number of cheques are what has given rise to the action, carried on business as an engineering and machinery merchant. He had two banking accounts, one with Messrs. King & Co., and the other with the appellants. His account with Messrs. King was heavily overdrawn in July, 1919, when, to use a colloquial expression, he converted himself into a limited company. This company was incorporated on July 11, 1919, under the name of A. L. Underwood, Limited, with a capital of £12,000 divided into 12,000 shares of £1 each. The subscribers to the memorandum of association were Underwood and a Mr. Callow, for one share each. By the articles, Underwood was appointed sole director, and at a meeting of the company held on July 15th, 1919, at which Underwood was the only person present, the two shares subscribed for as above were allotted, as well as 10,000 fully paid shares, to Underwood, being the consideration for the sale of his business to the company. No other shares in the company were ever allotted, and Callow's share was transferred in June, 1921, to Underwood's wife. On the formation of the company, a debenture in the form of a floating charge over the assets of the company was issued to King & Co. as security for the overdraft, and the company's account was kept at Messrs. King's. Underwood

continued to keep his private account with the appellant bank, where he was well known and had been a customer for many years.

"Within a few months after the formation of the company, Underwood began to pay the company's cheques into his private account with the appellants, and they collected the amounts due on the cheques and credited Underwood with the proceeds. The cheques so dealt with between December 20th, 1919, and February, 1922, were 45 in number, for amounts totalling £8,502 4s. It was for a conversion of these cheques that the action was brought.

"Underwood died in November, 1922. A receiver and manager of the company was appointed by the debenture holders, and he caused an investigation to be made of the books of the company by a firm of chartered accountants. The result of their investigation satisfied the learned Judge who tried this action that the true inference in reference to the action of Underwood in dealing with these cheques in the way in which he did was that he was acting as between himself and his company in fraud of the company. I see no reason to question the correctness of the inference so drawn by the learned Judge.

"All the cheques were drawn in favour of the company and were the undoubted property of the company. All the cheques were endorsed by Underwood in a form which indicated that he was endorsing them for the company as sole director. He clearly had the right to so endorse them. One defence relied upon by the appellants was that on these facts there was no evidence of any conversion of the cheques."

His Lordship then continued :—

"Unless the appellants can justify their action on one or other of the defences on which they rely, they appear clearly to have been guilty of a conversion of all the cheques, so clearly that it does not seem necessary to discuss the decisions in the cases of Arnold *v.* Cheque Bank (1 C.P.D., 578, 585); Fine Art Society, Limited *v.* Union Bank of London, Limited (2 Times L.R., 883; 17 Q.B.D., 705); Morison *v.* London County and Westminster Bank (Limited) (30 Times L.R., 481; [1914] 3 K.B., 356, 365); and Bissell *v.* Fox (1 Times L.R., 452; 51 L.T. Rep., 663) to which we were referred.

"One of the two other defences related only to the crossed cheques. The appellants claimed that they were protected with regard to these cheques by sec. 82 of the Bills of Exchange Act, because they received payment for these cheques in good faith and without negligence. The appellants' good faith is not challenged, but it is said, and the learned Judge accepted the view, that they failed to make good their contention that they acted without negligence. In this view of the facts I entirely agree, and I will refer to the facts relevant to this point

when dealing with the remaining defence of the appellants, which is the only one which admits of serious discussion. That defence is founded on the rule laid down in the cases of the Royal British Bank *v.* Turquand (6 E. and B., 327) and Mahony *v.* East Holyford Mining Company, Limited (liquidator) (L.R., 7 H.L., 869), conveniently stated by Lord Justice Lindley and Lord Justice Kay in Biggerstaff *v.* Rowatt's Wharf, Limited ([1896] 2 Ch., 93, at p. 102). Lord Justice Lindley says :—

"'Now, what is the law on this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or endorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bonâ fide*. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power.'

"If this was the whole of the rule, I think there is a good deal to be said for the contention put forward on behalf of the appellants that Underwood, in doing what he did, was not acting outside the apparent scope of his authority, as conferred upon him as sole director by the memorandum and articles of his company. Strange as it might appear that he should act as he did, it appears to be conceivably possible that in so acting he should have been acting honestly and in the interests of his company in the carrying on of their business. The fact that the company were overdrawn at their bankers with the result that the proceeds of the cheques, if collected by them, would not have been available for current expenses, or for some particular purchase, might be a legitimate reason for paying the cheques into some other than the company's account. It does not appear material on this point that Underwood was, in fact, acting in fraud of his company. The strangeness of his conduct, however, is material, not only on the issue of negligence, but also because it brings into operation what appears to be an undoubted branch of the rule of law on which this defence of the appellants rests.

"In Mahony *v.* East Holyford Mining Company (L.R., 7; H.L., 869) Lord Hatherley, at p. 894, states the rule thus :—

"'And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after

that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course, the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time. Outside persons where they find that there is an act done by a company will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on and transacting business, or whether it is a company which has been stopped and wound up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would in the course of their business make, I apprehend would have to be made on the part of the persons dealing with the company.'

"To the same effect is the passage in the judgment of Lord Justice Lindley in County of Gloucester Bank *v.* Rudry Merthyr Steam and House Coal Colliery Company ([1895] 1 Ch., 629). As the appellants are relying on a rule of law applicable only to dealings with an agent, they must take the rule as they find it, and if they have omitted, as I am clearly of opinion they have omitted, to make an ordinary inquiry, they must take the consequences. The cheques were plainly the property of the company. They were endorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid into Underwood's private account. Many of the cheques were marked in a way which of itself ought to have put the cashiers on inquiry. I entirely accept the view of the learned Judge with regard to the conduct of the cashiers, and I think that his conclusion establishes not only negligence on their part, but such an absence of ordinary inquiry as to disentitle the appellants from relying on a defence founded on the ostensible authority of Underwood. I feel satisfied that the obvious inquiry whether the company had not got its own banking account would have put a stop to the fraudulent system adopted by Underwood,

and I do not think that it lies in the mouth of the appellants to say that an inquiry would have been useless.

"For these reasons I think that the appeal fails, and must be dismissed, with costs."

Lord Justice Scrutton and Lord Justice Atkin read judgments concurring in the dismissal of the appeal.

In the appeal of Barclays Bank Limited, the facts were similar, but the bank set up the defence that they were holders for value of the cheques. The Court unanimously dismissed the appeal on the ground that the bank had failed to make out their case. Lord Justice Scrutton, in the course of his judgment, said :—

"The cases where an agent for collection becomes a holder for value, must turn on an express or implied agreement between bank and customer that the latter may draw against the cheques before they are cleared. Mr. Justice Roche has not been satisfied that there was any such agreement, and I do not differ from him. There was certainly no express agreement. Though the cheques were in fact credited to the customer's account before they were cleared, the customer was not informed of this, and I can see nothing to prevent the bank from declining to honour a cheque if the payment in, against which it was drawn, had not been cleared. The bank cashiers did in fact use their discretion, varying with each customer, as to whether they would, or would not, anticipate clearance in paying; but I can see no evidence from which to infer a binding agreement with the customer on the subject. None of these cheques was in fact drawn against before clearance. In fact, after Barclays had absorbed the London and Provincial Bank, with which Underwood had at first his account, there appears in the Barclay form of paying-in slip the note : 'The Bank reserves the right, at its discretion, to postpone payment of cheques drawn against uncleared effects which may have been credited to the account.'"

*Note.*—This case illustrates once more the danger of taking for private account cheques ostensibly for the benefit of a person or body to whom or which the customer stands in a subordinate or fiduciary position. Underwood clearly had right to endorse the cheques but only for the purposes of the company, which, in law, was a separate entity from himself. See Salomon *v.* Salomon & Co., Ltd. [1897] A.C., 22. Legal Decisions affecting Bankers, Vol. I. p. 240.

There are some important points to be noticed in the judgments other than those above set forth. The test of negligence in the collection of crossed cheques is often laid down somewhat

vaguely, and a good deal left to the opinion of a jury. Bankes, L.J., following Lord Dunedin in Taxation Commissioners *v.* English, Scottish and Australian Bank ([1920] A.C., at p. 689), says the test is "the ordinary practice of bankers," a more favourable criterion than that frequently adopted.

Again, Scrutton, L.J., on p. 306, distinctly lays down that "account payee" does not limit the negotiability of a cheque. This has been the generally accepted view, but it is the first time it has been judicially recognised.

But the disquieting feature in these judgments is the reopening of the crediting as cash question. The dictum of Scrutton, L.J., is given above. At p. 308, Atkin, L.J., says: "I think it sufficient to say that the mere fact that the bank in their books enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection does not, without more, constitute the bank a holder for value. To constitute value, there must be, in such a case, a contract between banker and customer that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques. Neither the Gordon case nor the 1906 Act lays down the rule, judicial or statutory, that if a bank credits a cheque at once in its books, that fact, without more, makes the bank a holder for value."

And Bankes, L.J., acquiesced in this view. Scrutton, L.J., stated that it was in accordance with that held by bankers, and that the bank would have succeeded if they had been *bonâ fide* holders for value.

It would probably be more correct to say that bankers never admitted the conclusions of the Gordon case to be sound from a business point of view; they failed, in common with many lawyers and some judges, to see how a mere uncommunicated book entry could make a collecting banker a holder for value or entitle the customer to draw.

But Law Lords had used, possibly without a full sense of their bearing, definite and well-known banking terms, and said, among other things, "It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque."—Lord Macnaghten.

"It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it unless something occurs to deprive him of that right."—Lord Lindley.

There was, moreover, the fact that it was on the basis of crediting as cash and so becoming holders for value that the bank succeeded with regard to the bearer cheques, classes 2 and 7 in the Gordon case.

Bankers, if not convinced, had to bow to what they understood or were told was the law.

Their attitude at that crisis must be within the memory of many. They promoted a bill: the Government took it over and eventually passed it as the Bills of Exchange (Crossed Cheques) Act, 1906.

That that Act was the outcome of the Gordon case and designed to restore to bankers who credited as cash the protection of sec. 82 of which that Judgment deprived them is, one would have said, common knowledge and indicated by its terms and its description as an amending Act.

In face of this, and the above extracts from and the whole trend of the Gordon case, it is strange to find Atkin, L.J., saying, "neither the Gordon case nor the 1906 Act lays down the rule, judicial or statutory, that if a bank credits a cheque at once in its books that fact, without more, makes the bank a holder for value."

In Sutters *v.* Briggs, *ante* p. 245, Lord Birkenhead, L.C., says, "The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act, 1906, confers the same protection on bankers who *by their action have made themselves not only 'holders' but holders in due course* (Gordon case and Bowen, L.J., in National Bank *v.* Silke)," thus citing the Gordon case for the very proposition Atkin, L.J., says it does not lay down.

No doubt the Statute does not formulate the rule; it was not its function to do so; but, as Lord Birkenhead shows, it clearly recognises it.

When the 1906 Act came into force, the banker's position seemed consolidated and commanding, if anomalous. The view taken of it, and according to Lord Birkenhead, rightly taken, was that when a banker credited a crossed cheque as cash he obtained the rights of a holder for value, while retaining the protection of sec. 82. If he so credited open order cheques, unless there was forged indorsement, or if he so credited open bearer cheques, he was holder for value, tantamount, in the case of a banker, to holder in due course.

Account payee has no effect on a holder for value.

*Per contra*, the customer got the right to draw. It was not very obvious how he was to know of such crediting, but if he did draw, the cheque was to be paid. See Jones *v.* Coventry [1909] 2 K.B. 1029.

The right to draw might be, frequently was, precluded by agreement or notice. In such case, the banker was protected as to crossed cheques by sec. 82 and the Act of 1906, but would not be holder for value.

Underwood's case reverses the last above-named position,

laying the onus of showing holder for value on the banker, who has to prove, in addition to crediting as cash, agreement that the customer may draw.

Although the matter has degenerated into legal argument, the Gordon case declared the question of holder for value to be one of fact.

But there seems to have been no direct evidence of any definite agreement that the customer should draw. The right was apparently admitted or deduced, as Lord Lindley deduces it, from the crediting as cash itself. Anyway, his statement and Lord Macnaghten's are perfectly general and professedly based on such crediting.

The banker's position, as above defined, is now challenged and threatened, and the question again more or less at large.

The matter calls for serious consideration: first, because this case puts a judicial construction upon the Gordon case which will not be universally accepted; second, it affects what has hitherto been an important factor in estimating the position of a bank collecting cheques, crossed or otherwise, when forged endorsement or "not negotiable" is not involved, but the customer has no title or a defective title.

If this judgment stands, the test in crossed cheque cases will be, not good faith, but negligence; with open cheques, even to bearer, there will apparently be no defence at all, unless one is derivable elsewhere.

[IN THE HOUSE OF LORDS.]

## GERALD McDONALD & CO. *v.* NASH & CO.

Reported. [1924] W.N. 127. 40 Times L.R. 530. Journal, XLV, 264.

*Endorsement of Bill of Exchange for Security—Bills of Exchange Act, Sec.* 20.

THIS was an appeal from a judgment of the Court of Appeal, who decided, by a majority, that the respondents never intended to become liable to the appellants on the bills, but only intended to be liable to the extent of enabling the appellants, if so minded, to discount the bills, and ordered that judgment should be entered for the respondents. The facts of the case appear from the judgment of the Lord Chancellor.

VISCOUNT HALDANE (Lord Chancellor).—My Lords, in the autumn of 1919 the appellants bought from the Government Disposal Board nearly 20,000 cases of Australian tinned soup. On May 18, 1920, they sold over 19,000 of these cases to a firm of William Archer and Co., Limited, at the price of 10*s.* per case, on the terms that a deposit of £500 should be made (which was done), and, for the rest, cash to be paid against delivery order on May 31, 1920. Archer and Co. were unable to find the money required, and approached the respondents for financial assistance. As the result, it was agreed in July, 1920, that, by way of consideration for assisting Archer and Co., the respondents were to get from them bills for payment at the rate of 3*s.* a case for the whole of the cases which had not then been taken up, amounting to about 16,000 cases. If the appellants agreed, Archer and Co. were to give them a six months' bill for the whole of the price of the cases of soup not taken up under the contract of May 18. The respondents were to take up and pay for the cases in 1,000 or 2,000 case lots, and were, as between themselves and Archer and Co., to find 75 per cent. of the money required—in other words, for every £1,000 found for the price Archer and Co. were to pay the respondents £250. As Archer and Co. drew on the cases taken up, they were to remit to the respondents cash at the rate of 10*s.* 6*d.* per case, against which the latter would issue delivery orders for the soup to the value received. On August 6 the appellants, before whom the agreement between Archer and Co.

and the respondents had been brought, wrote to the respondents agreeing to accept it.

My Lords, on August 10, 1920, the appellants, the respondents, and Archer and Co. met and made final arrangements for the delivery over and payment as regarded the cases. It was agreed that the respondents should endorse a series of eight bills, seven for £1,000 each, and one for £117 6*s.* 4*d.*, to be drawn by the appellants on Archer and Co., payable six months after date to the appellants' order, and that the appellants, in consideration of the bills being duly endorsed by the respondents, should hand to the latter delivery orders for the balance of the cases. These bills were at once drawn by the appellants on Archer and Co., expressed to be payable to the appellants' order, and were accepted by Archer and Co., endorsed by the respondents, and handed by the latter to the appellants. There was left sufficient room for the endorsement, if necessary, of the names of any persons to whom the appellants should direct payment, over those of the respondents. On receipt of the bills the appellants were to hand to the respondents in exchange the delivery orders. On August 18 the respondents took up 2,000 cases and paid the appellants £1,000, whereupon the latter returned to them one of the bills for that amount, discharged.

The respondents did not pay and so withdraw any of the remaining bills, and shortly before February 21, 1921, the date when they became payable, the appellants endorsed their names as payees on them, above the signature of the respondents. When the bills became due the appellants presented them for payment to Archer and Co., who dishonoured them. The appellants gave notice of dishonour and claimed payment from the respondents as endorsers. The respondents refused payment, and this action was brought against the respondents to recover the amount due on the bills, with interest.

My Lords, the action was tried before Mr. Justice Rowlatt. Various defences were raised. One was that the respondents had been induced by misrepresentation by the appellants to enter into the transaction. This was negatived by the learned Judge after hearing the witnesses. It was also said that the endorsement (which was made by one of the respondents' firm) was not binding on the respondents' firm by reason of want of authority. This also was decided adversely to the respondents. Then it was said that the bills were only accommodation bills, and that the appellants could not sue on them. The learned Judge rejected this defence also. On appeal to the Court of Appeal none of these contentions was insisted on, but a point of law was pressed. It was said that the appellants could not recover because the endorsement of the respondents was made before the name of the appellants had been written on the bills, which were to be

payable to order of the appellants as drawers. Mr. Justice Rowlatt held that it was proved that the appellants had the authority of the respondents to put the appellants' own name on them in the form they did. He considered, after weighing the testimony on both sides, that as the result of the evidence it was established that the bills were endorsed by the respondents and handed to the appellants for the very purpose of making the respondents, as endorsers, liable to pay the appellants.

My Lords, in the Court of Appeal the decision of Mr. Justice Rowlatt was reversed by Lords Justices Bankes and Atkin, Lord Justice Scrutton dissenting. The latter took the same view as the Judge who saw the witnesses and tried the case. He was of opinion that the respondents intended to render themselves liable to the appellants, and had not, as was argued, put their names on the paper merely in order to enable the appellants to discount, in which case the liability would have been to third parties exclusively. Lords Justices Bankes and Atkin took a different view of the facts. They thought that as the result of the evidence the respondents had not authorized the appellants to endorse the bills so as to create a right of action against the respondents otherwise than one which would be the outcome of the negotiation of the bills to outside parties. If so, the drawers could not, on well-known principles, sue the endorsers.

My Lords, after considering the evidence, I am unable to think that the majority of the Court of Appeal were justified in overruling the conclusion of fact arrived at by Mr. Justice Rowlatt. I think, with the latter and with Lord Justice Scrutton, that the respondents must be taken to have intended to make themselves liable to the appellants. I come to this conclusion as the result of a scrutiny of the documents and the evidence, and of the opinion, as to credibility, of the learned Judge who saw the witnesses in the box. I believe that all of your Lordships agree with the view that his finding of fact was the true one, and that the majority in the Court of Appeal ought not to have disturbed it.

Still, even assuming this finding to prevail, there remains a question of law. The drawers wrote on the bills no names of payees till the bills became due, six months after they had been drawn, and subsequently to the respondents' endorsement. What happened was that the bills when drawn were sent to Archer and Co., to whom they were addressed, for acceptance. When Archer and Co. had accepted, they sent on the bills, in accordance with what had been agreed, to the respondents for endorsement. This endorsement was made by the latter in pursuance of the agreement on the terms of which the appellants had entered into the transaction. Under that agreement the respondents must be taken to have endorsed so as to be liable to

the appellants themselves. The respondents accordingly did endorse the bills. But it was said that the bills they endorsed were not complete or regular bills, inasmuch as the drawers had not written on them their own names as payees, and that it was only to their order that the bills were expressed to be payable at all. It was therefore contended that the respondents did not become, when they wrote their names on the backs of the bills, holders of them in due course within sec. 29 of the Bills of Exchange Act 1882, or even holders within the definition sec. 2, since complete bills were not handed to them for endorsement, nor were in their possession so as to enable them to transfer them to the appellants as holders of complete bills in due course.

My Lords, this is a contention which I am unable to accept. Even by the law as it stood, apart from the code contained in the Bills of Exchange Act 1882, I do not think it was a sound one, having regard to what had been agreed on between the parties. As Lord Watson said, in "Steele *v.* M'Kinlay" (5 App. Cas., at p. 782), a person who writes an endorsement with intent to become a party to a bill may be held, notwithstanding that he has not, and therefore cannot give, any right to its contents, to be subject, in a question with subsequent holders, to all the liabilities of a proper endorser. And sec. 56 of the Act itself, which governs here, provides that where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an endorser to a holder in due course. This section appears to me to make him become liable as an endorser if, as here, he has intended to become so. As to the lack of the material particulars of the insertion by the drawers of the name of a payee, sec. 20 of the Act in that event, in my view, enabled the drawers in the circumstances of the case to exercise the authority which the agreement conferred on them to secure the liability, to themselves or other payees, of the respondents as indorsers. For the section provides that where a bill is wanting in any material particular the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. It was, I think, in accordance with the meaning of the sections I have quoted, within the capacity of the appellants to exercise the power conferred by sec. 20. I think that this was a material particular which there was authority to fill in. Glenie *v.* Bruce Smith (23 Times L.R., 596; [1907] 2 K.B., 507; 24 Times L.R., 177; [1908] 1 K.B., 263, in the Court of Appeal) appears to me to lay down a principle which extends as far, and I think that case was rightly decided. Gooch's case ([1921] 2 K.B., 593) was also decided on sec. 20, and is to the same effect. As pointed out by Lord Sterndale in Gooch's case (*supra*), Shaw and Co. *v.* Holland (29 Times L.R., 341; [1913] 2 K.B., 15) turned mainly on the absence of actual

authority to the drawer to complete the bill, as well as on the absence of an agreement by the endorser to become liable.

But speaking for myself, I do not consider it necessary to resort to the authority given by sec. 20, for it appears to me that the bills were, from the beginning, complete and regular on the face of them, and that the respondents took them for endorsement in consideration of value given to them under the provisions of the agreement, and for handing over to the appellants in due course under that agreement. It is true that the names of payees were not inserted by the drawers until after the endorsement by the respondents. But the bills were originally expressed to be payable to the order of the drawers.

My Lords, the bills being so drawn, I am unable to resist the conclusion that they must be read as payable to the drawers themselves, without another payee's name being written on them, if they chose to demand payment. Section 8 (5) of the Act provides that where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. As Lord Herschell observed in Bank of England *v.* Vagliano (7 Times L.R., 333; [1891] A.C., 107), we must take the language of a code such as this without inserting a limitation which is not to be found in it or indicated by it. I think, therefore, that from the first the bills in the present case were in law payable to the drawers themselves, if they chose to demand payment, and were therefore complete bills when the respondents endorsed them. No doubt the person paying would have asked for a receipt, and he might very likely have been given this in the form of an endorsement by way of receipt. He would not the less be likely to do this since sec. 9 of the Finance Act 1895, provides that the name of the payee written upon a draft or order is not to constitute a receipt chargeable with stamp duty. Such an endorsement operating by way of receipt only is nothing which the subsection makes a novelty. In Smith *v.* M'Clure (5 East, 476) Lord Ellenborough said in 1804 that "a bill payable to a man's own order was payable to himself, if he did not order it to be paid to any other." In Keene *v.* Beard (8 C.B.N.S., at p. 382) Mr. Justice Byles laid it down in 1860 that "one of the best receipts is the placing on the back of the instrument the name of the party who has received payment of it. Such an entry of the name on the instrument is not an endorsement." Section 8 (5) is accordingly only declaratory of old law, which has been the law throughout, whatever may have been the cautious practice of bankers and others in asking for what resembles a responsible endorsement for reasons of convenience.

For these reasons I think that the judgment of Mr. Justice Rowlatt was right and should be restored; and that the appellants should have their costs here and below.

Lord Dunedin said the appellants were not holders in due course from Nash and Co., but he felt no doubt that sec. 20 fitted the case. Endorsement was *ex hypothesi* the material particular that was wanting.

Lord Atkinson said the case was wholly different from Steele *v.* M'Kinlay. He said: "Is the absence of an endorsement by the drawers of a bill drawn simply to their order a 'material particular?' *Primâ facie* I should say it was, because the other parties, whether acceptors or endorsers, do not know till that has been done who are the persons to be paid."

He said the appellants had implied authority to make, on February 26, 1921, the amendment they did make in these bills by endorsing them, in order to carry out their agreement so as to satisfy the requirements of sec. 20, subsec. 2.

Lord Sumner, in the course of his judgment, said as follows:—

"Section 20 says a bill, and I am of opinion that each of these instruments was a bill when it was passed to Nash to be endorsed, and was still a bill when he redelivered it to McDonald after writing on the back of it."

He quoted Hirschfield *v.* Smith, L.R. 1 C.P., 340, which decided that an alteration in the endorsement of a bill was a material alteration, and concluded therefrom that the bills in the present case were wanting in a material particular, namely, the gap between the acceptance unendorsed by the payee and the actual first writing of another name, that of Nash, on the back.

He further said: "It is involved in the idea of completing, by a subsequent act, a bill which was incomplete before it, that the result of completion is to be the same as if the bill had never been defective at all; and to limit its efficacy to rights which only come into existence after the omission is supplied in effect deprives the section by mere implication of half its beneficial effect. The language of sec. 20 contemplates the very case with which we are now dealing."

He said the extreme case was that of a simple signature on blank stamped paper, where it operated to charge the signer as endorser although, when he wrote his name, not only had nothing been transferred to him which he could transfer in turn by endorsing and delivering the bill, but no draft, no acceptance and no order of the drawer, general or special, were in existence at all.

"The whole efficacy," his Lordship continued, "of the

endorsement is retrospective and is dependent on the subsequent action of a person who, according as he fills up the blank in one way or another, can make the person who has thus given his signature either the transferee of rights which he subsequently passes on as transferor or, at his choice, an acceptor who has no right to transfer but is under an ambulatory liability to all other parties who may come upon the bill.

"If this is the effect of the first part of the single sentence of which subsec. 1 consists I do not see how a more restricted interpretation can be placed on the other part so that the words 'in like manner' can be limited so as to exclude endorsees.

"I think further that the language of subsec. 2 points to the same conclusion and applies to all cases under subsec. 1."

After instancing incomplete bills, his Lordship said: "A bill complete on its face but purporting to be endorsed by a third party without that party's name being preceded by the endorsement of the drawer is another such instrument. In both cases the bill is incomplete till it is filled up in one way or the other, and when so filled up, though not before, it becomes retrospectively enforceable as if it had been complete throughout."

He said sec. 8 (5), which makes a bill payable to the order of A.B. payable to him or his order at his option, does not deal with the conditions necessary for a complete bill or declare that a bill drawn in that form is complete.

He expressly said he did not agree that these were complete bills so that sec. 20 need not be prayed in aid, therein directly differing from the Lord Chancellor.

He cited Russell *v.* Longstaffe, 2 Doug. 514, a case of signature on a blank stamped form, and applied to the present case the words used there: "It does not lie in his mouth to say the endorsements were not regular."

His Lordship further said: "The time of issue is the time to judge of completeness. The time of issue here was not when the drawers signed as drawers, nor even when the acceptors signed as acceptors, but the time when Nash and Co., having endorsed their names, delivered the endorsed bill to McDonald and Co. in exchange for the delivery orders. The bill was then a bill of exchange but incomplete and it is only under sec. 20 that the incompleteness could be cured."

Lord Buckmaster concurred.

Appeal allowed with costs.

*Note.*—Lord Haldane's speech is difficult to follow; he first applies sec. 20 and then says such application is not necessary, because the bills were complete when signed by Nash; two propositions which seem contradictory.

He is the only member of the House who held that the bills

were then complete, the other Law Lords deciding that, after Nash signed, the bills were "wanting in a material particular," viz. the drawer's endorsement, and that the drawer was entitled to supply this defect by virtue of sec. 20.

It was the contention of the respondents that the bills were complete when Nash signed, a contention based on the definition of a bill in sec. 3, the provisions of sec. 4 (5) and sec. 8 (5) as to a bill payable to drawer's order being payable to him personally, the description in sec. 72 (1) of endorsement as a "supervening contract," and the deduction from the necessary distinction in the case of a promissory note to drawer's order in sec. 82 (2).

They further relied on the emphatic protest of Lord Esher in Decroix *v.* Meyer Varley and Co., 25 Q.B.D., 343, against anything being deemed essential to the character of a bill beyond what is required by the Act, and the similar view of Lord Sterndale in National Park Bank *v.* Berggren, 19 Com. cases, 254, *ante*, p. 86.

On this basis they contended that sec. 20 had no application, that there never was and never could be endorsement by Nash as he was never holder but only at most equitable assignee under sec. 31 (4).

It is curious that the Bills of Exchange Act contains no adequate definition of an endorser or of endorsement, leaving the matter to the combined effect of secs. 2, 23, 31 (3), and 32. Comparison of these sections shows that to be an endorser a man must be a holder, the view taken by Sir Mackenzie Chalmers and expressed by Lord Blackburn in Steele *v.* M'Kinlay where, at p. 772, he says: "An endorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred." The liabilities and estoppels imposed by sec. 55 are limited to "the endorser of a bill," and endorsement may be disproved, except against holder in due course.

It is also curious that sec. 56 runs "where a person signs a bill otherwise than as drawer or acceptor" and omits as endorser. But the section obviously discriminates between a real endorser and a quasi-endorser by confining the remedy against the latter to a holder in due course, and it has always been treated as applying to the case of a person not a real endorser who signs as such. Lord Haldane says "sec. 56, which governs here," but, as held by Lord Dunedin, and as was obvious, McDonald & Co. never were or could be holders in due course.

It was further contended that the position of Nash to McDonald could only be that of transferor by delivery of a bearer bill, who is not liable thereon, because McDonald was relying on re-negotiation under sec. 37, and, after McDonald had endorsed, the bill was payable to bearer, and any presumed re-negotiation by

Nash must have been as transferor by delivery of a bearer bill. This argument is not noticed in the judgments.

The Lord Chancellor's opinion that the bill was complete is a minority one, and it must therefore be now accepted that sec. 20 applies to cases like the present, enables the drawer to add his endorsement within reasonable time, which may be taken to be any time prior to the maturity of the bill, above that of the party sought to be made liable, when the section supplies all the necessary incidents of original endorsement and delivery to the third party and endorsement and re-delivery by him, and renders him directly liable on the bill to the drawer. The section also removes all difficulties with regard to issue, according to Lord Sumner.

Many of the previous cases were confusing, if not conflicting; the present is the first in which sec. 20 has been directly applied to a bill to drawer's order bearing drawer's signature as such at the time when the stiffening endorsement was put on, the existence or non-existence of such signature at that date having hitherto been regarded as the crucial point.

Specially was this demonstrated in Singer *v.* Elliot, 4 Times L.R., 524, decided by a very strong Court of Appeal.

It is difficult to see what authority is required by a drawer to sign a bill to his order as endorser. Intention has been frequently referred to. Steele *v.* M'Kinlay and other cases declare that, though a man have intended something, unless he embodies it in a legal obligation it is nothing.

Steele *v.* M'Kinlay and Macdonald *v.* Whitfield, 8 A.C., 733, the previous final tribunal cases, must now be read in the light of the present case. The frequent references in the former case as to the so-called endorsement not involving liability to prior parties on the bill, and to "competent evidence," understood to mean evidence in writing as required by the Statute of Frauds to establish a guarantee, have misled judges and lawyers alike. So with regard to Macdonald *v.* Whitfield, which was a pure case of contribution between co-sureties, the class of agreement *inter se* to which effect must always be given, altogether apart from the bill and which does not trench on the sphere of guarantee.

The answer to question 645 in Questions on Banking Practice, 7th ed., also requires reconsideration. In that instance, drawer endorsed below the stiffening endorsement; and in some of the cases this has been regarded as not in accordance with the authority conferred by sec. 20, but it is probable this would now be treated as immaterial.

As pointed out in the Journal for May, 1924, p. 232, this judgment will probably not greatly influence the practical procedure of bankers in such cases. It is there suggested that either a note should be written on the bill by the surety or a letter obtained

from him, clearly indicating that the endorsement is to secure the drawer, not only subsequent holders.

A possibly better alternative is for the drawer to endorse specially to the surety, deliver to surety, he to endorse and redeliver to drawer.

As to this, Lord Atkinson says at p. 535 that no difficulty would have arisen if McDonald had endorsed so as to have named or indicated a payee and Nash had then endorsed the bills, and the same is deducible from other cases.

It may be noted that the Lord Chancellor incidentally lays down that the signature of payee's name on the back of an order cheque at the instance of the paying banker is a receipt and not an endorsement. The question whether such signature affords any protection under sec. 60 has been raised, but not decided in this country. Colonial Courts have held that no protection is acquired thereby. National Bank of South Africa *v.* Paterson, Transvaal Law Reports 1909, Part II, 322. Legal Decisions Affecting Bankers, Vol. II, 214. Smith *v.* Commercial Banking Co. of Sydney, Ltd., High Court of Australia on appeal from Supreme Court of New South Wales, [1910] 11. Commonwealth Law Reports, 667.

[IN THE KING'S BENCH DIVISION.]

## GREENHALGH AND SON *v.* THE UNION BANK OF MANCHESTER, LIMITED.

Reported. [1924] 2 K.B. 153.

*Banker and Customer—Specific Appropriation of Bills.*

His Lordship delivered judgment in this action, which had been tried at the Autumn Assizes at Manchester. The plaintiffs claimed £3,406 8*s.* 7*d.*, as money received by the defendants for the use of the plaintiffs.

The plaintiffs, who were cotton brokers in Liverpool, had entered into certain contracts of sale with Messrs. Winson and Co., cotton merchants, of Manchester. Messrs. Winson and Co. had sold to certain spinners the goods purchased from the plaintiffs, and had received bills in payment. The plaintiffs alleged that the proceeds of the spinners' bills were specifically appropriated to meet their own bills, which Messrs. Winson and Co. had accepted, that such appropriation was in pursuance of agreement, that notice of such appropriation had been given to the bank, and that, therefore, they were entitled to claim the proceeds from the bank as money received to their use. They also contended that they were equitable assignees of the proceeds, and that the bank had taken with notice of their claim.

The defendants denied that any appropriation had been made by Winson and Co. or had been accepted by themselves. They said that there was no contractual relationship between themselves and the plaintiffs.

### Judgment.

Mr. Justice Swift, in the course of a written judgment, said :—

"In my opinion, the law relating to the contentions raised before me is clear, and is this :—First, if a person making a payment of money (or handing a document or goods, the proceeds of which will become a payment of money) to another states definitely that such a payment is to be used for a particular purpose, and the person to whom it is made does not dissent, he accepts it, and must use it (unless otherwise instructed) for the purpose for which he receives it; and if he receives it for payment to a third party and that third party is informed of

the fact that the payment has been made, and that the payee is instructed to pay it to him, the third party is in law entitled to recover it as money had and received for his benefit. Secondly, where two parties have contracted that the money (or the proceeds of something which will ultimately become money) of one in the hands of a third party shall belong to the other, there is an equitable assignment, and such assignment is binding upon any third party who takes that money, knowing of the equitable right of the assignee, and such third party can take it only subject to that right.

"My finding of the facts may conveniently be summarised as follows:—(1) Before the plaintiffs drew their bills, Messrs. Winson and Co. had promised to pay the spinners' bills into the bank specifically charged to meet them; (2) when Messrs. Winson and Co. paid the spinners' bills into the bank they honestly intended to appropriate them to the plaintiffs' bills; (3) they did not do so because they inadvertently used inappropriate words; (4) the bank, on receiving the bills, did not pay them into Winson's general account, but into the bill provisional account, in which they could not be dealt with in any way until maturity; (5) before the bills reached maturity, the bank knew that Messrs. Winson and Co.'s agent had handed them to the bank with the intention of appropriating them to meet the plaintiffs' bills; (6) after the bank knew that the bills had been given to them to be thus specifically appropriated they took no steps to rectify the position; (7) knowing of the plaintiffs' interest and that Messrs. Winson and Co. had promised specifically to appropriate the proceeds of the bills for the plaintiffs' benefit, they paid those proceeds into the general account of Messrs. Winson and Co., in which they were promptly swallowed by a large overdraft.

"On these facts and in my view of the law, I have come to the conclusions that (1) there was an equitable assignment of the proceeds of the spinners' bills by Winson and Co. to the plaintiffs before they paid the spinners' bills into the bank; (2) before the bank paid the proceeds of the spinners' bills into the general account they knew of the arrangement between Winson and Co. and the plaintiffs, and therefore they paid the money into the general account, subject to that equitable assignment; (3) when the bank knew that Winson and Co. were claiming to appropriate the proceeds of these bills to meet the plaintiffs' bills they should then have claimed the right to have already appropriated to themselves, or have returned the bills to Winson and Co.

"With regard to the question whether a banker, having two accounts open for a customer and having appropriated bills to one, is entitled to transfer their proceeds to the other without

the customer's permission, I hold that a banker has no right, without the assent of the customer, to move either assets or liabilities from one account to the other. The very basis of his agreement with the customer is that the accounts shall be kept separate.

"I find that before the bank paid the proceeds of these bills into Winson's general account they had received notice of a specific appropriation and of an equitable assignment of the proceeds, and I therefore give judgment for the plaintiffs for the amount claimed, with costs."

*Note.*—This judgment did not proceed on the basis of a payment for the account of a third party, communicated to him and so recoverable by him, probably because apparently the payment was not so communicated. The learned judge, however, deals with the question and states the law on the point, which will also be found involved in the negative propositions laid down in Warwick *v.* Rogers, 5 M. & G. by Tindal, C.J., at p. 374.

The ground of decision was equitable assignment with notice thereof, following the lines of such cases as William Brandt's Sons and Company *v.* Dunlop Rubber Co. Ltd. [1905] A.C., 454.

The combination of the accounts was clearly unauthorised in the present case.

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